

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

NO. 100

WILLIAM J. BRYAN, DISTRICT ATTORNEY

OF THE STATE OF ILLINOIS

VS.

JOHN D. SEVERSON

(27,263)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 508.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON,
ET AL., APPELLANTS,

vs.

LYNN J. FRAZIER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NORTH DAKOTA.

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1 In the United States District Court for the District of North Dakota, Southeastern Division.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, L. A. WOOD, Nels Nichols, George Sidener, Emil Scow, W. C. Martin, Henry McLean, George P. Holmnes, B. W. Hersey, T. W. Baker, George Christenson, R. H. Levitt, E. J. McGeath, E. A. Anderson, T. B. Oakley, O. F. Bryant, George D. Elliott, John Satterlund, P. S. Chaffee, Alfred Thuring, J. S. Garnett, J. E. Baker, John R. Early, H. C. Johnson, John C. Leach, Fred Steckner, Fred L. Roquette, Iver K. Bakken, Michael Toay, J. L. Harvey, William Burnett, Nathan Upham, Orlando Brown, J. O. Hanchette, W. W. Wilde, Arlo Andrews, Duncan Brownlee, W. W. Cofell, E. B. Roscoe, C. H. Kinney, on Behalf of Themselves and All Other Taxpayers of the State of North Dakota, Plaintiffs,

VS.

LYNN J. FRAZIER, WILLIAM LANGER and JOHN N. HAGEN, Acting and Pretending to Act as the Industrial Commission of North Dakota; Lynn J. Frazier, Carl Kozitsky, William Langer, Obert Olson, and Thomas Hall, acting as the State Auditing Board; Lynn J. Frazier William Langer, Thomas Hall, Carl Kozitsky and Minnie J. Nielson, constituting and acting as the Board of University and School Lands; Obert Olson, as State Treasurer of the State of North Dakota; Carl Kozitsky, as State Auditor of the State of North Dakota, and Lynn J. Frazier, as Governor of said State; William Langer, as Attorney General of said State; John N. Hagen, as Commissioner of Agriculture and Labor of said State; Thomas Hall, as Secretary of State of said State, and Minnie Nielson, as Superintendent of Public Instruction of said State; and Lynn J. Frazier, William Langer, Thomas Hall, Carl Kozitsky, Obert Olson, John N. Hagen, and Minnie J. Nielson, individually, Defendants.

Pleas Before the Honorable Charles F. Amidon, Judge of the United States District Court for the District of North Dakota.

Be it remembered that on the 2nd day of April, 1919, a Bill of Complaint was filed in this action, which bill of complaint is in words and figures following, to-wit:

2 *Bill of Complaint.*

To the Honorable, the Judge of the District Court of the United States for the District of North Dakota:

The plaintiffs above named, bring this, their bill of complaint against the defendants above named, and thereupon complain and allege:

I.

That said plaintiffs are each and all citizens of the United States and of the State of North Dakota, and that their names, and the counties of their residence in the said State are as follows:

John W. Scott, Grand Forks County; William J. Howe, Cass County; O. B. Severson, Adams County; L. A. Wood, Barnes County; Nels Nichols, Billings County; George Sidener, Bottineau County; Emil Scow, Bowman County; W. C. Martin, Burke County; Henry McLean, Cavalier County; George P. Holmes, Divide County; B. W. Hersey, Eddy County; T. W. Baker, Foster County; George Christensen, Golden Valley County; R. H. Levitt, Grant County; E. J. McGeath, Hettinger County; E. A. Anderson, Kidder County; T. B. Oakley, LaMoure County; O. F. Bryant, Logan County; George D. Elliott, McHenry County; John Satterlund, McLean County; P. S. Chaffee, Mercer County; Alfred Thuring, Nelson County; J. S. Garnett, Pembina County; J. E. Baker, Ramsey County; John R. Early, Richland County; H. C. Johnson, Sargent County; John C. Leach, Sioux County; Fred Steckner, Slope County; Fred L. Roquette, Stark County; Iver K. Bakken, Steele County; Michael Toay, Stutsman County; J. L. Harvey, Towner County; William Burnett, Traill County; Nathan Upham, Walsh County; Orlando Brown, Ward County; J. O. Hanchett, Wells County; W. W. Wilde, Williams County; Arlo Andrews, Cass County; Duncan Brownlee, Cass County; W. W. Cofell, LaMoure County; E. B. Roscoe, LaMoure County; C. H. Kinney, LaMoure County.

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II.

That the defendants are citizens of the United States and of the state of North Dakota, and are the duly elected, qualified and acting officers of the said state, as follows: Lynn J. Frazier, Governor, William Langer, Attorney General, John N. Hagen, Commissioner of Agriculture and Labor, Obert Olson, State Treasurer, Carl Kozitsky, State Auditor, Thomas Hall, Secretary of State, and Minnie J. Neilson, Superintendent of Public Instruction.

III.

That under section 375 of the Compiled Laws, North Dakota, 1913, the said Lynn J. Frazier as Governor, Carl Kozitsky as State Auditor, William Langer, as Attorney General, Obert Olson as State Treasurer, and Thomas Hall as Secretary of State, constitute the State Auditing Board, and as such Board, audit all claims against the State prior to the issuance of the State Auditor's warrant on the Treasurer in payment thereof.

IV.

That under Section 156 of the Constitution of North Dakota, Lynn J. Frazier as Governor, William Langer, as Attorney General,

Thomas Hall as Secretary of State, Carl Kozitsky as State Auditor, and Minnie J. Neilson as Superintendent of Public Instruction constitute the Board of University and School Lands, and as such have control of the investment of the permanent school fund of the state derived from the rental and sale of all school and university lands given to the state in trust by the United States for the support of public schools; and under section 162 of the State Constitution are authorized to invest such funds in State Bonds. That said fund now consists of \$919,730.16 in cash, \$10,276,964.99 in municipal bonds, \$5,661,253.61 in loans secured by farm mortgages on property within the state of North Dakota; and in addition thereto a large acreage of lands and deferred payments upon land sale contracts, of such value that the total amount of cash, bonds, mortgages, lands and contracts exceed in value the sum of \$50,000,000.00

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V.

That Obert Olson as State Treasurer is the custodian of the state's funds derived from taxation, and is also custodian of the state school fund, and disburses such school fund upon warrants drawn by the State Auditor.

VI.

That Carl Kozitsky as State Auditor directs the disbursement of the State funds by warrants upon the State Treasurer in payment of moneys directed by law to be paid out of the treasury, and by his warrant directs the payment of the permanent School fund.

VII.

That under the pretended authority of House Bill No. 17, passed by the Sixteenth Legislative Assembly of the State of North Dakota, which in form took effect on February 26th, 1919, and which is hereinafter set out in full, the defendants, Lynn J. Frazier, as Governor, John N. Hagen, as Commissioner of Agriculture and Labor, and William Langer as Attorney General claim and pretend to constitute the Industrial Commission of North Dakota, and have organized, and are now acting as such Commission.

VIII.

That plaintiffs are taxpayers of the State of North Dakota and are owners of both real and personal property in this state, and in the counties of their residence, which is subject to taxation to meet the obligations of the state, and also subject to local taxes. That the plaintiffs, and the other taxpayers of the state of North Dakota are the beneficial owners, subject to taxation to meet the obligations of the state, and also subject to local taxes. That the plaintiffs, and the other taxpayers of the state of North Dakota are the beneficial owners, subject to the legal and proper use thereof

by the state of North Dakota for state purposes, of all moneys and funds now in the treasury of the state of North Dakota, collected by taxation for the purpose of defraying the expenses of the government of the state, and which funds are held and controlled by the defendants, as officers of the state, as hereinbefore described. That said funds are held in trust by the defendants in their official capacity, for the plaintiffs and the other taxpayers of the

5 state. That said funds now amount to more than three hundred thousand dollars. That from time to time additional sums of money, amounting to hundreds of thousands of dollars each year, raised by taxation against the property of plaintiffs, and the other taxpayers of the state of North Dakota, are being collected and covered into the Treasury of the state, for the purpose of defraying the legitimate expenses of the state government, and the defendants, in their official capacity aforesaid, come into the custody and control of said moneys as the same are collected as hereinbefore set forth. That the state of North Dakota has no moneys, funds, or property, aside from that collected by the taxation of the property of the plaintiffs and the other taxpayers of the state, except moneys realized from school and institutional lands granted to the state by the United States at the time of admission to the Union. That said school and institutional lands and moneys realized therefrom cannot, under the compact with the United States, be used for any purpose other than the maintenance and support of the schools and institutions of learning of the state and for the purpose of maintaining and supporting other public institutions of the state.

That the plaintiffs bring this action as taxpayers on behalf of themselves and on behalf of the other taxpayers of the state who are many thousand in number, and who have a common and general interest in the questions presented in this case, and are so numerous as to make it impracticable to bring them all before the court.

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IX.

This is a suit in equity between the plaintiffs and the said defendants, and arises under the constitution and laws of the United States, as hereinafter will more particularly appear; and involves, exclusive of interest and costs, a sum or value in excess of \$300,000.00 of moneys now in the treasury of the state of North Dakota, derived from taxation of property and persons in said state, and \$17,000,000.00 in bonds of the state of North Dakota, to be issued as hereinafter set forth, which said bonds, if permitted to issue, create a charge upon the property of the state of North Dakota, which must be met by the taxation of the people and property of said state; and that each of the matters in controversy in this action, exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and that each of said matters arises under the constitution and laws of the United States.

X.

That the defendants, assuming and claiming to act as officers of the state, and in an official capacity, and under the pretended au-

thority of certain amendments to the state constitution of North Dakota, which are claimed to have become effective on or about February 1st, 1919, and certain pretended acts of the Sixteenth Legislative Assembly of North Dakota, which in form took effect on the 26th day of February, 1919, all of which are hereinafter set out, threaten to divert, pay out and transfer, and unless restrained and enjoined by this court, will pay out, divert and transfer from the general funds of the state, and from funds of the cities, villages, townships and school districts of the state derived from taxation, and from the permanent school funds of the state, large sums of money in the purchase of the bonds herein referred to and for other unlawful purposes; and threaten to create and issue, and unless restrained and enjoined by this court, will create and issue, obligations of the state in the form of state bonds, aggregating in amount the sum of \$17,000,000.00 for unlawful purposes, and threaten to negotiate and sell, and unless restrained and enjoined by this court, will negotiate and sell said bonds, and will pledge the faith and credit of the state of North Dakota for the payment thereof.

XI.

The defendants justify the acts of which complaint is made in this action by the alleged amendments to the state constitution approved on or about February 1st, 1919, and the pretended acts of the Sixteenth Legislative Assembly, approved February 26th, 1919, referred to in paragraph "X" hereof.

XII.

That prior to 1914, all constitutional amendments were initiated by the Legislature subject to the approval of the electors, such amendments being governed by section 202 of the state constitution, which in part read as follows:

"Any amendment or amendments to this constitution may be proposed in either house of the legislative assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly to be chosen at the next general election and shall be published, as provided by law, for three months previous to the time of making such choice, and if in the legislative assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislative assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the legislative assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislative assembly voting

thereon, such amendment or amendments shall become a part of the constitution of this state."

In 1914, Section 202, just quoted, was amended by adding thereto the following, in substance:

"Any amendment or amendments to this Constitution may also be proposed by the people by an initiative petition. When such petition has been properly filed the proposed amendment or amendments shall be placed upon the ballot to be voted upon by the people at the next general election. Should any such amendment or amendments proposed by initiative petition and submitted to the people receive a majority of all the legal votes cast at such general election, such amendment or amendment shall be referred to the next Legislative assembly; and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each House, such amendment or amendments shall become a part of the Constitution of this state."

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XIII.

Prior to February 1st, 1919, Section 185 of the State constitution was in force and read as follows:

"Neither the state nor any county, city, township, town, school district, or any other political subdivision shall loan or give its credit or make donation to or in aid of any individual, association or corporation except for necessary support of the poor; nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in any work of internal improvement unless authorized by a two thirds vote of the people, Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways."

That on or about February 1st, 1919, the foregoing section was in form amended to read as follows:

"Section 185, Article 12 as amended by Article 18 of the amendment. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business not prohibited by Article 20 of the Constitution (the manufacture and sale of intoxicating liquor), but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation, except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

XIV.

That prior to February 1st, 1919, the state debt limit was fixed by Section 182 of the state constitution, at \$200,000, which so far as material, follows:

"The state may, to meet casual deficits or failure in the revenue, or in case of extraordinary emergencies, contract debts, but such debts shall never in the aggregate exceed the sum of two hundred thousand dollars, exclusive of what may be the debt of North Dakota, at the time of the adoption of the Constitution. * * * No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for public defense, in case of threatened hostilities."

That said Section 182 of the constitution was in form amended on or about February 1st, 1919, to read as follows:

"Section 182 in Article 12. The state may issue or guarantee the payment of bonds, providing that all bonds in excess of two million dollars shall be secured by first mortgages upon real estate in amounts not to exceed one half of its value; or upon real estate or personal property of state owned utilities; enterprises or industries, in amounts not exceeding its value, and provided, further, that the state shall not issue or guarantee bonds upon property of state owned utilities, enterprises or industries in excess of ten million dollars. No future indebtedness shall be incurred by the state unless evidenced by bond issue, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax, or make other provisions sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax, or of such other provision for the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for the public defense in case of threatened hostilities.

XV.

That the pretended amendments to Section- 182 and 185 of the State Constitution hereinbefore set out, and the acts of the legislature of the state of North Dakota, adopted in pursuance and under the pretended authority thereof and referred to herein are void and of no force or validity, for the following reason, among others, to-wit: That said constitutional amendments were submitted and voted upon at the general election held in the fall of 1918, and did not receive a majority of all the legal votes cast at such election.

XVI.

That the Sixteenth Legislative Assembly of the state of North Dakota, after in form approving the constitutional amendments hereinbefore referred to, and for the purpose of carrying out the

Industrial program thereunder and therein authorized, passed the following acts, all of which were declared adopted by sufficient vote to place them in operation on their approval, and which said pretended acts were approved on February 26, 1919, to-wit: House Bills 17, 18 and 49, and Senate Bills 130, 20, 75 and 19.

XVII.

That the several legislative acts above referred to and here in question, for convenience of reference will hereafter be referred to as follows:

House Bill 17, as "The Industrial Commission Act."

House Bill 18, as "The Bank of North Dakota Act."

House Bill 49 as "The Bank of North Dakota Bond Act."

Senate Bill 130 as "The Bank of North Dakota Real Estate Bond Act."

Senate Bill 20 as "The Mill and Elevator Association Act."

10 Senate Bill 75 as "The Mill and Elevator Association Bond Act."

Senate Bill 19 as "The Home Building Act".

Which said acts are now set out in full in the order in which they are above named.

(Note: For convenience of reference the seven Legislative Acts above described, which are a part of this paragraph, are placed at the end of the bill in this transcript.)

XVIII.

That the amendments to sections 182 and 185 of the constitution, hereinbefore set out, and the acts of the legislature set out in the preceding paragraph, purport and pretend to authorize the state of North Dakota to enter into private industries, enterprises, and business projects, such as general banking, buying, selling and handling grain, owning and operating elevators and flour mills, home building, and general real estate loan business, general merchandising, and other business of every character and description.

XIX.

That the defendants, Lynn J. Frazier, William Langer, and John N. Hagen, officers of the state of North Dakota, as aforesaid, claiming to act under the provisions and authority of the said constitutional amendments and the Industrial Commission Act. hereinbefore set forth, have organized as, and now claim to be a lawfully organized body under the name of "The Industrial Commission of North Dakota." That said commission and said persons acting and claiming to act as such Industrial Commission as aforesaid, unless enjoined and restrained by order and judgment of this court, will expend large sums of money of the state of North Dakota, being funds and moneys raised by taxation against the people and prop-

erty of the state of North Dakota, to-wit: in excess of the sum of \$400,000.00, and that such expenditures have already commenced and will continue until the appropriations available therefor have been expended. That such expenditures generally will be made on account of and for the following purposes:

That said commission and the members thereof as aforesaid, have employed a secretary of the said commission at a salary of \$3600 per annum, and are threatening to, and will engage in and undertake all of the different enterprises and business projects specially provided and under the said acts of the legislature hereinbefore set forth, and have commenced the organization of the said special businesses so referred to in the acts of the legislature hereinbefore set forth, and will expend the full amount of the appropriations provided in said Industrial Commission Act, to-wit, the sum of \$200,000.00.

That the said Industrial Commission and the members thereof as aforesaid, have begun proceedings for the organization and development of the Bank of North Dakota, as provided for in the Bank of North Dakota Act, as hereinbefore set forth, and have employed a bank expert to assist in the further work of the organization and operation of said bank, at a salary of \$5000 per annum, and unless restrained and enjoined by this court, will continue in the establishment and operation of said bank without interruption until the full sum of the appropriation provided for in said act, to-wit, \$100,000.00, is fully expended.

That the said Industrial Commission and the members thereof as aforesaid, unless restrained and enjoined therefrom by the order and judgment of this court, will proceed immediately to carry out the provisions of the Bank of North Dakota Bond Act, as hereinbefore set forth, and in so carrying out said provisions, will expend the full sum of the appropriation provided for in said Act, to-wit, the sum of \$10,000.00.

That the said Industrial Commission and the members thereof as aforesaid, unless restrained and enjoined therefrom by the order and judgment of this court, will proceed immediately to carry out the provisions of the Bank of North Dakota Real Estate Bond Act as hereinbefore set forth, and in so carrying out said provisions, will expend the full sum of the appropriation provided for in said act, to-wit, the sum of \$10,000.00.

12 That the said Industrial Commission and the members thereof as aforesaid, unless restrained and enjoined therefrom by the order and judgment of this court, will proceed to establish a system of warehouses, elevators, flour mills, factories, plants, etc., within and without the state of North Dakota, and will employ managers, agents and others in the operation and carrying on of said warehouses, elevators, flour mills, factories, etc., at great expense to the state of North Dakota, and will acquire property within the state of North Dakota, for the purpose of establishing such enterprises as aforesaid, and as described and set forth in the Mill and Elevator Association Act as hereinbefore recited, by purchase or by virtue of the law of eminent domain, and at great expense to the

state of North Dakota, and will enter upon the business of manufacture, storage, sale, exchange and other methods of acquiring and disposing of all kinds of manufactured and raw farm food products and by-products, and will do all other acts and things authorized or attempted to be authorized in and by the provisions of said Mill and Elevator Association Act, and in the doing thereof, will expend the full amount of the appropriation provided for in said act, which said appropriation amounts to the sum of more than \$100,000.00.

That the said Industrial Commission and the members thereof as aforesaid, unless restrained and enjoined therefrom by the order and judgment of this court will proceed immediately to carry out the provisions of the North Dakota Mill and Elevator Association Bond Act, as hereinbefore set forth, and in so carrying out said provisions, will expend the full sum of the appropriation provided for in said Act, to-wit: the sum of \$10,000.00.

That the said Industrial Commission and the members thereof as aforesaid, unless restrained and enjoined therefrom by the order and judgment of this court, will proceed immediately to carry out the provisions of the Home Building Act, as hereinbefore set forth, and in so carrying out said provisions, will expend the full sum of the appropriation provided for in said Act, to-wit: the sum of \$100,000.00.

13 That if the defendants herein named are permitted to use the public funds of the state of North Dakota as threatened and herein set forth, a deficit of public moneys and funds required for the purpose of meeting the expenses of the state government will be created, amounting to the sum of the appropriations aforesaid, to-wit, \$400,000.00, and that in the event of such deficit, the same would have to be restored by taxation upon the property of the plaintiffs and the other taxpayers of the state.

20.

That unless enjoined and restrained by the order and judgment of this court, the said defendant Obert Olson as State Treasurer aforesaid, will immediately prepare for issue, and the said Lynn J. Frazier as Governor aforesaid, and the said Obert Olson as State Treasurer aforesaid will execute and issue negotiable bonds of the state of North Dakota in the aggregate amount of two million dollars under the pretended authority of the Bank of North Dakota Bond Act, as hereinbefore set forth, and Thomas Hall, Secretary of State will attest the same, and with Carl Kozitsky, State Auditor, will certify to said bonds so executed, as provided in said Bank of North Dakota Bond Act, which said bonds are and will be known and designated as Bonds of North Dakota, Bank Series, and thereupon said bonds will be delivered to the Industrial Commission hereinbefore referred to, and will be by said Commission and the members thereof, as hereinbefore designated and referred to, negotiated and sold, thereby creating a liability against the state of North Dakota in the sum of two million dollars, which said liability can only be met and liquidated by moneys raised by taxation against the people

and property of the state of North Dakota, and which moneys thus raised and said liability thus created will be for a private business enterprise, and contrary to, and in violation of the rights of these plaintiffs and all other taxpayers in the state of North Dakota, and in violation of the fundamental principles of a republican form of

14 government and the constitution of the United States.

That the said defendants above named, and in this paragraph referred to, unless enjoined and restrained by the order and judgment of this court, will in the same manner as herein set forth, execute, issue, attest and certify bonds of the state of North Dakota under the provisions of the Bank of North Dakota Real Estate Bond Act hereinbefore set forth in the aggregate amount of ten million dollars, to be known as Bonds of North Dakota, Real Estate Series, and thereupon said bonds will be delivered to the Industrial Commission hereinbefore referred to, and will be by said Commission and the members thereof as hereinbefore designated and referred to, negotiated and sold.

That the said defendants above named, and in this paragraph referred to, unless enjoined and restrained by the order and judgment of this court, will in the same manner as herein set forth, execute, issue, attest and certify bonds of the state of North Dakota under the provisions of the Mill and Elevator Association Bond Act hereinbefore set forth, in the aggregate amount of five million dollars, to be known as Bonds of North Dakota, Mill and Elevator Series, and thereupon said bonds will be delivered to the Industrial Commission hereinbefore referred to, and will be by said Commission and the members thereof as hereinbefore designated and referred to, negotiated and sold.

That the bonds will constitute a liability against the state of North Dakota in the aggregate sum of Seventeen Million Dollars, which said liability can only be met and liquidated by moneys raised by taxation against the people and property of the state of North Dakota, and which moneys thus raised, and said liability thus created, will be for private business enterprises, and in violation of the rights of these plaintiffs and all other taxpayers of the state of North Dakota, and of the fundamental principles of a republican form of government and the Constitution of the United States.

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XXI.

That the bonds authorized by the acts of the Sixteenth Legislative Assembly, referred to herein, would be invalid, for the following reasons:

(a) Because issued for private business, and not for public purposes;

(b) For the reason that they would violate the constitution of the state of North Dakota in this: That no sufficient provision is made in said acts for a sinking fund to meet and pay the principal of the bonds to be issued under said acts, as required by Section 182 of the state constitution;

(c) For the reason that the legislature did not exercise its function of fixing the amounts, denominations, maturities and rate of interest on said bonds, but on the contrary attempted to delegate the legislative function of fixing and determining the same to the discretion of the Governor and the Industrial Commission.

XXII.

That the purpose of the proposed expenditure of public funds and the creation of public debts of which these plaintiffs complain, is not a public or a governmental purpose, but is a private or business purpose, and is for the purpose of financial profit and gain for those who are interested in the various industries and enterprises and business projects proposed to be installed. That such enterprises do not rest upon the public health or welfare of the people of the state or any other governmental reason which would justify the proposed expenditures or the creation of the proposed debts or in any manner come within the taxing or police power of the state. That no condition exists in the state of North Dakota which will authorize or justify the state, in the exercise of its legitimate functions of government, in engaging in the various lines of private business contemplated as aforesaid, under the said constitutional amendments and acts of the legislature, or in making the proposed expenditures

or incurring the proposed debts. That the facilities now
16 provided for supplying the people of the state of North Dakota with the necessities and luxuries of life, and conveniences and requirements for their comfort, welfare and health, are adequate.

North Dakota has an area of 79,837 square miles, and a population, according to the war census, of 664,625. It has 53 counties, each of which is served by one or more of six railroads, whose total mileage, including main line and branch line trackage, is 6,295 miles.

On the lines of its several railroads are more than 250 incorporated cities and villages, and numerous unincorporated hamlets, and all together, more than one thousand railroad stations or sidings where freight and merchandise is loaded and unloaded, with numerous privately owned general stores where merchandise and food products, including flour, and all the necessities of life, are kept for sale, and sold.

It has 74 flour mills in operation, which are scattered over the various parts of the state, with a capacity varying from 25 to 1800 barrels per day, and a total capacity of 16,720 barrels a day, or 5,000,000 barrels capacity for a year. The mills thus privately owned and operated have the capacity of producing between seven and eight times more flour than the people of North Dakota consume, and a capacity not only to feed all the people of the state, but still have for export to other states or counties, over four million barrels per year.

It has more than 2000 licensed and privately owned warehouses and elevators located at railroad stations in the several counties of the state, with a total capacity for storing grain, of more than 60,000,000 bushels.

It has 706 state and national banks, with capital stock and surplus ranging from \$10,000 to \$560,000.

It also has a large number of loan and trust companies and numerous loan agencies, specializing in making of loans on farm lands, said individual loan agencies being distributed throughout the state, and in each and every county thereof. It also has a great number of building and loan associations specializing in making loans upon city property.

North Dakota has an area of 40,000,000 acres, more than half of which is unbroken prairie, and used for grazing and stock raising.

The principal occupation of the rural population of this state is that of grain growing, dairying and stock raising.

That a large proportion of the taxpayers of the state of North Dakota, who are the owners of a large part of the taxable property of the state, are in no manner interested in any of the business enterprises or projects authorized and provided for by the legislative acts here in question.

XXIII.

That if the state of North Dakota were permitted to engage in the various enterprises, industries and projects hereinbefore referred to, the plaintiffs and the other taxpayers of the state, in whose behalf this suit is brought, will suffer irreparable injury and damage, and will become involved in a multiplicity of suits. That the plaintiffs and said other taxpayers will be denied the equal protection of the law, and will be deprived of their property without due process of law, all in violation of their rights as citizens of a free government, and in violation of the guaranties of the Fourteenth Amendment to the Constitution of the United States. That they will be denied the protection of Section 4, Article 4, of the Constitution of the United States, guaranteeing to each state and the citizens thereof, a republican form of government. That the protection of the guaranties of the Constitution of the United States, referred to, is now claimed by the plaintiffs in their own behalf, and on behalf of all other taxpayers of the state. That these plaintiffs, and those in whose behalf this suit is prosecuted, have no adequate remedy at law.

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XXIII.

The constitutional amendments and acts of the legislature hereinbefore set forth authorize the defendants in the operation and conduct of the various enterprises provided for in said acts, to incur and create obligations and indebtedness in addition to the obligations and indebtedness hereinbefore specifically referred to, amounting to millions of dollars, for which indebtedness and obligations the state of North Dakota stands guarantor, and for the payment and liquidation of which the property of the plaintiffs, and the other taxpayers of the state of North Dakota may be appropriated.

Wherefore and in consideration of which, and inasmuch as plaintiffs and all other taxpayers of the state of North Dakota, on behalf

of whom this action is brought, are remediless at or by the strict rules of common law, and are only relievable in a court of equity where matters of this kind are properly cognizable, the plaintiffs file this bill of complaint against said defendants and pray:

1.

That the said defendants may be required to make full and true answer to this bill of complaint (but not under oath, answer under oath being hereby expressly waived).

2.

That section 182 of the constitution of the state of North Dakota, and all amendments thereto, in so far as the same pretends to or authorizes the said state to issue or guarantee the payment of bonds issued or guaranteed for the purpose of raising funds, either to capitalize or to maintain and operate either or any of the proposed state-owned utilities, enterprises or business projects provided for in the legislative acts of the Sixteenth Legislative Assembly of the state of North Dakota, described as House Bill 17, House Bill 18, Senate Bill 20 and Senate Bill 19, as hereinbefore and in paragraph 17 set out in full, be adjudged and decreed illegal and void.

3.

19 That section 185 of the constitution of the state of North Dakota and all amendments thereto, insofar as the same pretends to or authorizes the said state to engage in any industry, enterprises or business of a private nature, and not within the governmental functions or police power of the state, be adjudged and decreed illegal and void.

4.

That the act of the Sixteenth Legislative Assembly of the state of North Dakota, known as House Bill No. 17, and entitled

"An act creating the Industrial Commission of North Dakota, authorizing it to conduct and manage on behalf of the state certain utilities, industries, enterprises and business projects, and defining its powers and duties; and making an appropriation therefor."

Which said act is fully set out in paragraph 17 of this bill of complaint, in so far as the same pretends to, or authorizes the so-called Industrial Commission thereby, and by the terms of said act created, to engage in, take charge of, control, manage, or in any manner establish, conduct, or operate any utility, industry, enterprise or business project of a private nature and not within the governmental functions or police power of the state, be adjudged illegal and void.

5.

That the act of the Sixteenth Legislative Assembly of the State of North Dakota, known as House Bill No. 18, and entitled:

"An act, declaring the purpose of the state of North Dakota to engage in the banking business and establishing a system of banking under the name of the Bank of North Dakota, operated by the state, and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; making an appropriation therefor; and providing penalties for the violations of certain provisions thereof."

which said act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to and authorizing the said state of North Dakota to enter upon and conduct a business project of a purely private nature (to-wit: the establishment of
20 and carrying on of a system of banking) and that the same is not within the provision of any governmental functions or police power of the state, and that the said legislative act, being House Bill No. 18, and all authority pretended to be given thereunder be, adjudged and decreed illegal and void.

6.

That the act of the Sixteenth Legislative Assembly of the state of North Dakota, known as House Bill No. 49 and entitled—

"An act providing for the issuing of bonds of the state of North Dakota in the sum of two million dollars, to be known as "Bonds of North Dakota, Bank Series," prescribing the terms, and stating the purposes thereof; providing a tax and making other provisions for the payment thereof; making appropriations for the payment of said bonds, and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure."

which said act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to and authorizing the said state of North Dakota to issue certain bonds in the aggregate sum of two million dollars to be used, and the proceeds thereof to be used in a purely private business project, not within the provisions of any governmental function or police power of the said state, and that said act, being House Bill No. 49, and all authority pretended to be, or granted thereunder or thereby, for the issuance of any bond or bonds of the state of North Dakota, be adjudged and decreed illegal and void.

7.

That the act of the Sixteenth Legislative Assembly, of the state of North Dakota, known as Senate Bill No. 130, and entitled—

21 "An Act providing for the issuing of bonds of the state of North Dakota in a sum not exceeding Ten Million Dollars, to be known as "Bonds of North Dakota, Real Estate Series," prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal on said bonds, and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure."

which act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to, and authorizing the said state of North Dakota to issue certain bonds in the aggregate sum of ten million dollars to be used, and the proceeds thereof to be used in a purely private business project not within the provisions of any governmental function or police power of the said state, and that said Act, being Senate Bill No. 130, and all authority pretended to be or granted thereunder and thereby, for the issuance of any bond or bonds of the state of North Dakota, be adjudged and decreed illegal and void.

8.

That the Act of the Sixteenth Legislative Assembly of the state of North Dakota, known as Senate Bill No. 20, and entitled—

"An Act declaring the purpose of the state of North Dakota to engage in the business of manufacturing and marketing of farm products, and for establishing a warehouse, elevator and flour mill system under the name of North Dakota Mill and Elevator Association operated by the State, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management, and making an appropriation therefor."

which said act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to and authorizing the said state of North Dakota, to engage in a purely private business project or enterprise, to-wit: the business of manufacturing and marketing of farm products, and for the establishing of warehouses, elevators and flour mills, either within or without the state, or in foreign countries, and that such business projects or enterprises are not within the provisions of any governmental function or police power of said state, and that said act, being Senate Bill No. 20, and all authority for the establishment, maintenance and conduct of each, any or all of the businesses therein provided for, be adjudged and decreed illegal and void.

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9.

That the Act of the Sixteenth Legislative Assembly, of the state of North Dakota, known as Senate Bill No. 75, and entitled—

"An Act providing for the issuing of bonds of the state of North Dakota in a sum not exceeding Five Million Dollars to be known as

"Bonds of North Dakota, Mill and Elevator Series"; prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal of said bonds, and to carry into effect the provisions of this act; and declaring this act to be an emergency measure."

which said act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to, and authorizing the said state of North Dakota to issue certain bonds in the aggregate sum of five million dollars to be used, and the proceeds thereof to be used in a purely private business project, not within the provisions of any governmental function or the police power of the said state, and that said act, being Senate Bill No. 75 and all authority pretended to be or granted thereunder and thereby, for the issuance of any bond or bonds of the state of North Dakota, be adjudged and decreed illegal and void.

10.

That the Act of the Sixteenth Legislative Assembly of the state of North Dakota, known as Senate Bill No. 19, and entitled—

"An Act declaring the purpose of the state of North Dakota to engage in the enterprise of providing homes for residents of this state, and to that end to establish a business system operated by the state under the name of the Home Building Association of North Dakota attempted to be, pretended to be, or authorized by House the powers and duties of the persons charged with its management, and making an appropriation therefor,"

which said act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to, and authorizing the state of North Dakota to enter upon, establish and conduct a purely private business project or enterprise, to-wit: the building of homes and loaning of money upon real estate security, and that such business project or enterprise is not within the provisions of any governmental function or police power of the said state, and that said act, being Senate Bill No. 19, and all authority pretended to be or granted thereunder and thereby for the establishment and conduct of the business project or enterprise therein provided for be adjudged and decreed illegal and void.

11.

That the said defendant Obert Olson individually and as state Treasurer of the state of North Dakota be forever enjoined and prohibited by the order, judgment and decree of this court, from preparing or issuing, either or any of the bonds of the state of North Dakota, and defining the scope and manner of its operations, and Bill No. 49, Senate Bill No. 130, or Senate Bill No. 75, herein be-

fore referred to; and that the said defendant Thomas Hall, individually and as secretary of state in and for the state of North Dakota, be by the order, judgment and decree of this court, forever enjoined and prohibited from attesting either or any of the bonds so provided in said bills in this paragraph of the prayer mentioned; and that the said defendants, Carl Kozitsky, individually and as Auditor of the state of North Dakota, and the said Thomas Hall individually and as Secretary of State of the state of North Dakota, be forever enjoined and prohibited by the order, judgment and decree of this court, from signing and endorsing upon each, either or any of said bonds so attempted to be, pretended to be, or authorized to be issued as aforesaid, any certificates showing that said bonds, or any of them were issued pursuant to law and within the debt limit of the state; and that the said Lynn J. Frazier individually and as Governor of the state of North Dakota, and the said Obert Olson individually and as Treasurer of the state of North Dakota, be forever enjoined and prohibited from executing any of the said bonds so attempted to be, pretended to be, or authorized to be issued by either of said legislative acts herein, and in this paragraph of the prayer referred to; and that said defendants individually and as officers as aforesaid, each and all be forever enjoined and prohibited by the order, judgment and decree of this court, from delivering any

24 bonds so pretended to be or authorized under the provisions of each or any of the said acts of the Sixteenth Legislative Assembly of the state of North Dakota herein, and in this section of the prayer referred to, to the said Industrial Commission authorized under the provisions of House Bill No. 17 aforesaid; and that the said Lynn J. Frazier, Governor of the state of North Dakota, John N. Hagen, Commissioner of Agriculture and Labor of the said state, and William Langer, Attorney General of said state, individually and in their official capacity, and as members of the Industrial Commission aforesaid, be forever enjoined and prohibited from negotiating, selling or otherwise disposing of any bond or bonds issued under the provisions of any said act of the Sixteenth Legislative Assembly of the state of North Dakota as hereinbefore set forth, being House Bill No. 18, House Bill No. 49, and Senate Bill No. 75, hereinbefore more particularly referred to.

12.

That the appropriations provided for and attempted to be made, or made in and by the provisions of the certain acts of the Sixteenth Legislative Assembly of the state of North Dakota, known as House Bill No. 17, House Bill No. 18, House Bill No. 49, Senate Bill No. 130, Senate Bill No. 20, Senate Bill No. 75, and Senate Bill No. 19, which said acts are set out in full in paragraph 17 of this bill of complaint, be by the order, judgment and decree of this court declared the appropriation of public funds of the state of North Dakota, for private use, and illegal and void.

13.

That Lynn J. Frazier as Governor of said state, Carl Kozitsky as State Auditor, William Langer as Attorney General, Obert Olson as State Treasurer, and Thomas Hall as Secretary of State, constituting the State Auditing Board, of the said state, of North Dakota, individually, and as such officers and members of said board, be forever enjoined and prohibited by the order, judgment and decree

of this court from auditing any claim or demand for a warrant or other character of requisition upon the funds of the state of North Dakota for the payment of any of the appropriations attempted to be made, or made in any or either of the acts of the Sixteenth Legislative Assembly of the State of North Dakota known as House Bill No. 17, House Bill No. 18, House Bill No. 49, Senate Bill No. 130, Senate Bill No. 20, and Senate Bill No. 75 and Senate Bill No. 19.

Also that the said defendant Carl Kozitsky, as auditor of the said state of North Dakota, be by the order, judgment and decree of this court, forever enjoined and prohibited from drawing, executing and delivering his warrant or order upon the treasurer of the state of North Dakota, for the payment of any of the funds of the state of North Dakota, in payment of any or either of the appropriations made as aforesaid in said bills in this paragraph of the prayer enumerated; and that the defendant, Obert Olson, as State Treasurer of the said State of North Dakota, be by the order, judgment and decree of this court forever enjoined and prohibited from paying out of the funds of the said state of North Dakota, any order, warrant, draft or other requisition calling for the payment of any of said funds because of any authority, pretended to be given, or given in and by any or either of the said legislative acts in this paragraph of this prayer enumerated.

14.

That the defendants Lyon J. Frazier, Governor; William Langer, Attorney General; Thomas Hall, Secretary of State, Carl Kozitsky, State Auditor, and Minnie J. Nielson, Superintendent of Public Instruction, constituting the "Board of University and School Lands," individually and officially, as officers of the said state of North Dakota, and as said Board of University and School Lands, be by the order, judgment and decree of this court forever enjoined and prohibited from investing any of the funds of the state of North Dakota realized from the sale of school lands in any bond, or bonds, issued, negotiated or sold under the provision of either or any of the acts of the Sixteenth Legislative Assembly of the state of North Dakota, known and referred to as House Bill No. 49, Senate Bill No. 130, and Senate Bill No. 75, and that said defendants in this paragraph of this prayer enumerated, individually and as officers of the said state of North Dakota, and members of the said Board of University and School Lands, be, by the order, judgment and decree of this court, forever enjoined and

prohibited from placing or depositing any of the funds of the state of North Dakota derived from the sale of school lands of the state of North Dakota in any bank attempted to be, or organized under and by virtue of the provisions of the act of the Sixteenth Legislative Assembly of the state of North Dakota known and described as House Bill No. 18.

15.

That a temporary order be issued against the defendants restraining and enjoining them from carrying out or attempting to carry out the provisions of the constitutional amendments and acts of the legislature aforesaid during the pendency of this action; and restraining and enjoining said defendants from doing or performing any of the acts or things complained of herein, during the pendency of this action.

16.

That plaintiffs have such other and further relief in the premises as the nature of the case shall require, and to your Honor shall seem meet and proper.

17.

27 Plaintiffs further pray that a writ of subpoena be issued directed to said defendants and each of them, commanding them, and each of them to appear and make answer to plaintiffs' bill of complaint at a certain time, and to abide the further orders of the court.

N. C. YOUNG,
J. S. WATSON,
E. T. CONMY,
Of Fargo, N. D.;
TRACY R. BANGS,
PHILIP R. BANGS,
C. J. MURPHY,
T. A. TONER,
Of Grand Forks, N. D.,
Solicitors for Plaintiffs.

STATE OF NORTH DAKOTA,
County of Cass, ss:

William James Howe, being duly sworn, deposes and says that he is one of the plaintiffs in the above entitled suit; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to the knowledge of the deponent; except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

WILLIAM JAMES HOWE.

Subscribed and sworn to before me this 29th day of March, 1919.

E. T. CONMY,

[SEAL.]

Notary Public, Cass County, N. D.

My commission expires —.

STATE OF NORTH DAKOTA,

County of Grand Forks, ss:

John W. Scott being duly sworn, deposes and says that he is one of the plaintiffs, in the above entitled suit; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to the knowledge of the deponent, except as to matters therein stated upon information and belief, and that as to those matters he believes it to be true.

JOHN W. SCOTT.

Subscribed and sworn to before me this 31st day of March, 1919.

H. N. HAMILTON,

[SEAL.]

Deputy Clerk, U. S. District Court.

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Industrial Commission Act—House Bill No. 17.

An Act

Creating the Industrial Commission of North Dakota, authorizing it to conduct and manage on behalf of the State certain utilities, industries, enterprises and business projects, and defining its powers and duties; and making an appropriation therefor.

Be It Enacted by the Legislative Assembly of the State of North Dakota:

Section 1. A commission is hereby created and established to conduct and manage, on behalf of the state of North Dakota, certain utilities, industries, enterprises and business projects, now or hereafter established by law. It shall be known as the Industrial Commission of North Dakota, but may be designated as the Industrial Commission.

Section 2. The Industrial Commission shall consist of three members, namely: The Governor, the Attorney General, and the Commissioner of Agriculture and Labor, of the State of North Dakota. Two members shall constitute a quorum for the transaction of business. The first meeting of the Commission shall be held in the office of the Governor, at his call, within twenty days after this Act goes into effect. Its meetings thereafter shall be held at such times and places as the Governor or a majority of the Commission may determine. It shall be provided by the proper authorities with suitably furnished offices at the seat of government.

Section 3. The Governor shall be the Chairman of the Industrial Commission, and its attorney shall be the Attorney General of the

State. In the transaction of its general business it may employ secretaries and other subordinate officers, clerks and agents, on such terms as it may deem proper, appointing and discharging all persons so engaged when and as, in its judgment the public interests may require. The Commission may require suitable bonds of any such secretary or other subordinate officer, clerk or agent, and shall
29 fix the amount of the compensation of each. Such compensation together with other expenditures for operation and maintenance of the general business of the Commission, shall remain within the appropriation available in each year for such purpose.

Section 4. The Industrial Commission shall adopt and procure an official seal, and may authenticate therewith its documentary acts. All orders, rules, regulations, by-laws and written contracts, adopted or authorized by the commission shall, before becoming effective, be approved by the Governor, as Chairman, and shall not be in force unless approved and signed by him.

Section 5. The Industrial Commission is hereby empowered and directed to manage, operate, control and govern all Utilities, enterprises and business projects, now or hereafter established, owned, undertaken, administered or operated by the State of North Dakota, except those carried on in penal, charitable or educational institutions. To that end it shall have the power, in the exercise of its sound judgment, and is hereby directed.

(a) To determine the locations of such utilities, industries, enterprises and business projects.

(b) For the State, and in its name and behalf, in order to accomplish the purposes of this Act, to acquire by purchase, lease or by exercise of the right of eminent domain, as provided by Chapter 36 of the Code of Civil Procedure. Compiled Laws of 1913, all necessary properties and property rights and to hold and possess or to sell the whole or any part thereof: to construct and reconstruct necessary buildings thereon, to equip, maintain, repair, and alter any and all such properties and the improvements thereon; and generally to use the same so as to promote such utilities, industries, enterprises and business projects.

(c) To appoint a Manager, and all necessary subordinate officers and employees, of and for each such utility, industry, enterprise and business project; to constitute any such Manager its general agent in the performance of its duties in the particular utility, industry, enterprise or business project in which he shall be engaged, but
30 subject, nevertheless, in such agency to the supervision, limitation and control of the Commission; to employ such contractors, architects, builders, attorneys, salesmen, clerks, accountants and other experts, agents and servants, as in the judgment of the Commission and the interests of the State may require; and to define the duties, designate the titles, and fix the compensation and bonds, of all such persons so engaged in each such utility, industry, enterprise and business project; provided, however, that subject to the control and regulation of the Commission the manager of each such

utility, industry, enterprise and business project shall appoint and employ such deputies, assistants and other subordinates, and such contractors, architects, builders, attorneys, salesmen, clerks, accountants and other experts, agents and servants, as he shall in his judgment deem are required by the interests of the utility, industry, enterprise or business project, together with other expenditures for the operation and maintenance thereof, shall remain within the appropriation and earnings lawfully available in each year for such purpose.

(d) To remove and discharge any and all persons appointed in the exercise of the powers granted by this Act, whether by the Commission or by any manager of any utility, industry, enterprise or business project; and any such removal may be made whenever in the judgment of the Commission the public interests require it; provided, however, that all appointments and removals contemplated by this Act shall be so made as the Commission shall deem most fit to promote the efficiency of the public service.

(e) To fix the buying price of things bought and the selling price of things sold, incidental to the said utilities, industries, enterprises and business projects, and to fix rates and charges for any and all services rendered thereby. In fixing such prices, rates and charges, the Commission shall make provision for accumulating a fund with which to replace, in the general funds of the state, the amount received by the Commission under the appropriation made in this Act, as may be directed by the legislative assembly.

31 (f) To make rules, regulations, orders and by-laws for the management and operation, and for the transaction of the business, of such utilities, industries, enterprises and business projects.

(g) To procure the necessary funds for such utilities, industries, enterprises and business projects by negotiating the bonds of the state of North Dakota, in such amounts and in such manner as may be provided by law.

(h) To conduct investigations of all matters directly or indirectly connected with, or bearing upon the success of, any of the utilities, industries, enterprises, and business projects under its management, and of all matters which may directly or indirectly effect the methods, operation, processes, products or results thereof. In aid of any such investigation the Commission shall have power to summon and compel the attendance of witnesses, and to examine them under oath, which any member thereof shall have the power to administer. It shall have access to and may order the production of, all books, accounts, papers and property, material to such investigation. Witnesses other than those in the employ of the state shall be entitled to the same fees as in civil cases in the district court. The claim that any testimony or evidence sought to be elicited are produced on such examination may tend to criminate the person giving or producing it, or expose him to public ignominy, shall not excuse

him from testifying or producing evidence, documentary or otherwise; but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any matter or thing concerning which he may testify or produce such evidence; provided, that he shall not be exempted from prosecution and punishment for perjury committed in so testifying. It shall be the duty of the Commission to cause the testimony so taken to be transcribed and filed in the office of the Commission at the seat of government, within ten days after it is taken, or as soon thereafter as practicable, and when so filed it shall be open for inspection by any person. Any person failing or refusing to obey the order of the Commission issued under the provisions of this section, or to give or produce evidence when required, shall be reported by the Commission to the District Court or any judge thereof, and shall be dealt with by the court 32 or judge as for contempt of court.

(i) To make rules and regulations for its own procedure; and to do any and all things necessary or expedient in conducting the business of such utilities, industries, enterprises and business projects, and in the accomplishment of the purposes of this Act.

Section 6. The Industrial Commission shall prepare an annual report and file it in the office of the Secretary of State not later than the first day of February of each year. The report shall contain an itemized account of its expenditures and a complete and detailed financial statement of each utility, industry, enterprise and business project, under its control, showing fully all items of income and disbursements and liabilities of every nature for the calendar year ending December 31st next preceding. The report shall also set forth a list of all persons in the employ of the Commission, with the name of each person drawing a salary under its authority, the amount of the salary and all other emoluments received, and the fund from which drawn.

Section 7. There is hereby appropriated out of the general funds of the State, not otherwise appropriated, two hundred thousand dollars, or so much thereof as may be necessary, to carry out the provisions of this Act. This appropriation is hereby made available immediately upon the passage and approval of this act.

Section 8. This Act is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval.

Bank of North Dakota Act—House Bill No. 18.

An Act

Declaring the purpose of the State of North Dakota to engage in the banking business and establishing a system of banking under the name of the Bank of North Dakota, operated by the State, and defining the scope and manner of its operation and the powers

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and duties of the persons charged with its management; making an appropriation therefor; and providing penalties for the violation of certain provisions thereof;

Be it enacted by the Legislative Assembly of the State of North Dakota:

Section 1. For the purpose of encouraging and promoting agriculture, commerce and industry, the State of North Dakota shall engage in the business of banking, and for that purpose shall, and does hereby, establish a system of banking owned, controlled and operated by it, under the name of the Bank of North Dakota.

Section 2. The Industrial Commission shall operate, manage and control the Bank of North Dakota, locate and maintain its places of business, of which the principal place shall be within the state, and make and enforce orders, rules, regulations and bylaws for the transaction of its business. The business of the Bank, in addition to the other matters herein specified, may include anything that any bank may lawfully do, except as herein restricted; but this provision shall not be held in any way to limit or qualify either the powers of the Industrial Commission herein granted, or the functions of said Bank herein defined. The Industrial Commission shall meet within twenty days after the passage and approval of this Act to begin the organization of the Bank.

Section 3. To accomplish the purposes of this Act, the Industrial Commission shall acquire by purchase, lease or by exercise of the right of eminent domain, as provided by chapter 36 of the Code of Civil Procedure, Compiled Laws of 1913, all requisite property and property rights, and may construct, remodel and repair buildings; but it shall not invest more than ten per cent of the capital of the bank in furniture, fixtures, lands and buildings for office purposes.

34 Section 4. The Industrial Commission shall obtain such assistance as in its judgment may be necessary for the establishment, maintenance and operation of the Bank. To that end it shall appoint a manager, and may appoint such subordinate officers and employees as it may judge expedient. It may constitute such manager its general agent, in respect to the functions of said Bank, but subject, nevertheless, in such agency, to the supervision, limitation and control of the Commission. It shall employ such contractors, architects, builders, attorneys, cashiers, tellers, clerks, accountants, and other experts, agents and servants as in the judgment of the Commission the interests of the state may require, and shall define the duties, designate the titles, and fix the compensation and bonds of all such persons so engaged; provided, however, that subject to the control and regulation of the Commission, the Manager of the bank shall appoint and employ such deputies, cashiers, tellers, and other subordinates, and such contractors, architects, builders, attorneys, clerks, accountants, and other experts, agents and servants, as he shall, in his judgment, deem are required by the interest of the

Bank. The total compensation of such appointees and employees together with other expenditures for the operation and maintenance of the Bank, shall remain within the appropriation and earnings lawfully available in each year for such purpose. All officers and employees of the Bank engaged upon its financial functions shall, before entering upon their duties, respectively furnish good and sufficient bonds to the State in such amount and upon such conditions as the Commission may require and approve; but the bond of the manager shall not be less than fifty thousand dollars. Such bond shall be filed with the Secretary of State.

Section 5. The Industrial Commission may remove and discharge any and all persons, appointed by the exercise of the powers granted by this Act, whether by the Commission or by the Manager of the Bank, and any such removal may be made whenever in the judgment of the Commission the public interests require it; provided, however, that all appointments and removals contemplated by this Act shall be so made as the commission shall deem most fit to promote the efficiency of the public service.

Section 6. The bank shall be opened and shall proceed to transact business whenever there shall be delivered to the Industrial Commission bonds in the sum of two million dollars issued by the State as may be provided by law for such purpose. The fund procured by the negotiations and sale of such bonds is hereby designated and shall be known as the capital of said bank.

Section 7. All state, county, township, municipal and school district funds, and funds of all penal, educational and industrial institutions and all other public funds shall be, by the persons having control of such funds, deposited in the Bank of North Dakota within three months from the passage and approval of this Act, subject to disbursement for public purposes on checks drawn by the proper officials in the manner now or hereafter to be provided by law; provided, however, that on a proper showing made by any official having control of public funds, the Industrial Commission may permit postponement of the deposit of such funds or any part thereof in the Bank of North Dakota, the period of such postponement not to exceed six months. And provided further, that if any such funds are now loaned by authority of law under a contract terminating at a future time, then the deposit of such funds in the bank of North Dakota shall not be required until two months after the time of expiration of such contract. Any person who shall violate any of the provisions of this Section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in a county jail for not less than ninety days, and by a fine of not less than one hundred dollars.

Section 8. Whenever any of the public funds hereinbefore designated shall be deposited in the Bank of North Dakota, as hereinbefore provided, the official having control thereof, and the sureties on the bond of every such official, shall be exempt from all liability by reason of loss of any such deposited funds while so deposited.

Section 9. The Bank of North Dakota may receive deposits from any source, including the United States Government and any foreign or domestic individual, corporation, association, municipality, bank, or government. Funds may be deposited to the credit of the Bank of North Dakota in any bank or agency approved by the Industrial Commission.

Section 10. All deposits in the Bank of North Dakota — hereby guaranteed by the State. Such deposits shall be exempt from state, county and municipal taxes of any and all kinds.

Section 11. Funds deposited by State Banks in the Bank of North Dakota shall be deemed "available funds" within the meaning of that term as used in section 5170 of the Compiled Laws of 1913. For banks that make the Bank of North Dakota, a reserve depository, it may perform the functions and render the services of a clearing house, including all facilities for providing domestic and foreign exchange, and may re-discount paper, on such terms as the Industrial Commission shall provide.

Section 12. The Industrial Commission, unless otherwise limited by law, shall from time to time fix the rates of interest allowed and received in transactions of the bank. Such rates shall be as nearly uniform and constant as practicable, and shall not be fixed or changed to work any discrimination against or in favor of any person or corporation. But in respect to time deposits received by the Bank, transactions may be reasonably classified as to the amounts and the duration of time involved and a reasonable differentiation of interest rates based on such classification may be allowed. When interest is allowed on any deposits it shall not be less than one or more than six per cent. The Industrial Commission shall also fix reasonable charges without unjust discrimination, for any and all services rendered by the Bank.

Section 13. All checks and other instruments and items of exchange payable on demand, sent by the Bank of North Dakota to any State Bank or banking association in North Dakota, for collection, shall be by such State Bank or banking association remitted for at par to the Bank of North Dakota. Any person or corporation who shall violate any of the provisions of this section shall be guilty of a misdemeanor.

Section 14. The Bank of North Dakota may deposit funds in any bank or banking association within or without the state upon such terms and conditions as the Industrial Commission shall determine.

Section 15. The Bank of North Dakota may transfer funds to other departments, institutions, utilities, industries, enterprises or business projects of the state, which shall be returned with interest to the Bank. It may make loans to counties, cities or political subdivisions of the state, or to state or national banks, on such terms, and under such rules and regulations, as the Industrial Commission

may determine; but it shall not make loans or give its credit to any individual, association — private corporation, except that it may make loans to any individual, association or private corporation secured by duly recorded first mortgages on real estate in the state of North Dakota in amounts not to exceed one half the value of the security, or secured by warehouse receipts issued by the Industrial Commission or by any licensed warehouse within the state, in amounts not to exceed ninety per cent of the value of the commodities evidenced thereby. It shall not, however, loan on real estate security more than thirty per cent of its capital, nor in addition thereto, more than twenty per cent of its deposits. Additional funds that may be required for such real estate loans, shall be procured from the sale of state bonds as may be provided by law.

Section 16. The Industrial Commission shall prescribe the forms of application for a mortgage loan on real estate, and shall provide for appraisal of the proposed security. Until otherwise provided by the Commission, when an application for a mortgage loan on real estate is made, it shall be referred to the Commissioner of University and School Lands, for appraisal of the proposed security. The Commissioner of University and School Lands shall thereupon promptly cause it to be appraised in the same manner as school lands are ap-

38 praised, and upon completion of such appraisal, shall return the application, together with the appraisal, to the bank.

Thereupon the bank shall promptly determine whether to grant or refuse any part or all of such loan.

Section 17. Every such mortgage shall contain an agreement providing for the repayment of the loan on an amortization plan by means of a fixed number of annual installments sufficient to cover, first, a charge on the loan, at a rate not exceeding the interest rate in the last series of real estate loan bonds issued, if any, by the State of North Dakota; second; a charge for administration and surplus, at a rate not exceeding one per cent per annum on the unpaid principal, said two rates combined constituting the interest rate on the mortgage; and third, such amounts to be applied on the principal as will extinguish the debt in not less than ten nor more than thirty years; provided, however, that advance payment of one or more annual installments, for the reduction of the principal, or the payment of the entire principal, may be made at any regular installment date; and provided further, that in case of a crop failure which reduces the mortgagor's reasonable crop income by one half, all payments under said mortgage may, in the discretion of the Industrial Commission, be extended for one year, upon condition that on the payment of all installments, such further annual payments shall be made as will pay the interest, with interest thereon, for the years for which no payments were made. The industrial commission shall determine whether a mortgagor is entitled to an extension of the payment of any installment, under the provisions of this Section.

Section 18. Every such mortgage, and the note or other obligation thereby secured, shall run to "The Manager of the Bank of

North Dakota, his successors in office or his assigns", as payee and mortgagee, and shall contain a recital that it is executed and delivered in conformity with and upon the conditions expressed in this Act, designated by its title and the date of its approval. After having been duly recorded in each county in which the lands therein described are situated, every such mortgage shall be delivered to the Manager of said Bank and together with said acts or other obligation secured by said mortgage shall be to the Bank of North Dakota, and whenever it shall have been fully paid, the Manager shall promptly satisfy and discharge the mortgage lien of record and deliver the mortgage cancelled, with a satisfaction thereof, to the person entitled to receive it.

Section 19. Every such mortgage, together with the note or other obligation thereby secured, may be sold and assigned upon the payment to the Bank of the full value thereof, and upon such sale and assignment the Manager may endorse either with or without recourse. In that case payments upon said note or other obligation shall be made to the person entitled to receive them; but each such assignment shall be made subject to the provision concerning extension of the time of payments on account of crop failures as provided in Section 17 of this Act, and subsequent action of the Industrial Commission in that regard shall be binding upon the assignee of such mortgage; provided, however, that after assignment of such mortgage extensions of payment for a yearly period shall be limited in total number to not more than one for every period of five years or fraction thereof during which such mortgage has to run after the date of assignment.

Section 20. Every such mortgage, together with the note or other obligation thereby secured, may be assigned, and upon order of the Industrial Commission shall be assigned, to the State Treasurer of the State of North Dakota as security for bonds to be issued by the State as provided by law. In case of such assignment all payments due upon said note or other obligation shall be made to the State Treasurer, and the money so by him received shall be by him held or disbursed as may be provided by law. If while any such mortgage so assigned to the State Treasurer is in his hands, the note or obligation thereby secured shall have been fully paid, the State Treasurer shall so certify to the Manager of the Bank, who shall thereupon proceed to satisfy said mortgage in the same manner as though said note or other obligation had been paid directly to the Bank. In case of such assignment to the State Treasurer of any such mortgage, the provisions contained in Section 19 of this Act, respecting extensions on account of crop failure, shall be effective and shall be applied.

Section 21. All business of the bank may be conducted under the name of "The Bank of North Dakota." Title to property pertaining to the operation of the Bank shall be obtained and conveyed in the name of "The State of North Dakota, doing business as the Bank of North Dakota." Written instruments shall be executed

in the name of the State of North Dakota, signed by any two members of the Industrial Commission, of whom the Governor shall be one, or by the manager of the Bank of North Dakota, within the scope of his authority so to do as defined by the Industrial Commission.

Section 22. Civil actions may be brought against the State of North Dakota on account of causes of action claimed to have arisen out of transactions *nonconnected* with the operation of the Bank of North Dakota, upon condition that the provisions of this section are complied with. In such actions the State shall be designated as "The State of North Dakota, doing business as the Bank of North Dakota," and the service of process therein shall be made upon the Manager of said Bank. Such actions may be brought in the same manner and shall be subject to the same provisions of law as other civil actions brought pursuant to the provisions of *law as other civil actions brought pursuant to the provisions of* the Code of Civil Procedure. Such actions shall be brought, however, in the county where the Bank of North Dakota shall have its principal place of business, except as provided in Sections 7415, 7416 and 7418, Compiled Laws of North Dakota, 1913. The provisions of sections 375 and 657 of the Compiled Laws of 1913 shall not apply to claims against the State, affected by the provisions of this action.

Section 23. The State Examiner shall personally or through deputy examiners, visit the Bank of North Dakota at least twice annually, and shall inspect and verify the assets in its possession and under its control, with sufficient thoroughness of investigation 41 to ascertain with reasonable certainty whether the valuations are correctly carried on its books. He shall investigate the methods of operation and accounting. He shall report the result of each such examination and investigation to the Industrial Commission as soon as practicable, and to the Legislative Assembly at its next ensuing session, and, as provided in paragraph numbered 5 of section 5146 of the Civil Code, Compiled Laws, 1913, to the State Banking Board.

Section 24. There is hereby appropriated out of the general funds of the State not otherwise appropriated, one hundred thousand dollars, or so much thereof as may be necessary to carry out the provisions of this Act. This appropriation is hereby made available immediately upon the passage and approval of this act. The Industrial Commission shall, out of the earnings of the Bank, make provision for accumulating a fund with which to replace in the general funds of the State the amount received by the Commission under this appropriation, as may be directed by the Legislative Assembly.

Section 25. All Acts and parts of Acts inconsistent with this Act are hereby repealed.

Section 26. This Act is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval.

*Bank of North Dakota Bond Act—House Bill No. 49.***An Act**

Providing for the issuing of bonds of the State of North Dakota in the sum of two million dollars, to be known as "Bonds of North Dakota, Bank Series;" prescribing the terms, and stating the purposes thereof; providing a tac and making other provisions for the payment thereof; making appropriations for the payment of said bonds and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure.

Be it enacted by the Legislative Assembly of the State of North Dakota:

Section 1. The State Treasurer is hereby directed forthwith to prepare for issue, and the Governor and the State Treasurer
42 are hereby authorized, empowered and directed to issue, negotiable bonds of the State of North Dakota in the aggregate amount of two million dollars. They shall be executed by the Governor and the State Treasurer under the great seal of the State, and shall be attested by the Secretary of State. The Auditor and Secretary of State shall endorse and sign on each such bond a certificate showing that it is issued pursuant to law and is within the debt limit. The bonds so issued shall be designated "Bonds of North Dakota, Bank Series."

Section 2. The bonds so issued shall be payable to the purchaser or bearer; provided however, that the provisions of Section 151 Compiled Laws of 1913 are hereby declared to apply to them. They shall be issued in denominations of from five dollars to ten thousand dollars, and shall be payable in not less than ten nor more than thirty years from the passage of this act. They shall bear interest at a rate not exceeding six per cent per annum from their date until maturity, payable semi-annually on the first day of January and of July in each year; and coupons shall be attached to each bond, evidencing the amount of interest payable at each first day of January and July until maturity. Principal, and interest shall be payable at the office of the State Treasurer in Bismarck. The terms of said bonds, as to values of denominations, period of maturity and rates of interest, shall be fixed by the Governor in his sound judgment, within the limitations above stated. Every such bond and coupon must be presented for payment at the office of the State Treasurer within six years from the date of its maturity; and no such bond or coupon shall bear interest after maturity unless payment thereof shall not be made upon due presentation for payment. All said bonds shall be exempt from state, county and municipal taxes of any and all kinds.

Section 3. The said issue of bonds is authorized, for the purpose of making delivery thereof to the Industrial Commission of North

Dakota as hereinafter provided, and as contemplated by section six of the act entitled "An Act declaring the purpose of the State of North Dakota to engage in the banking business and establishing a system of banking under the name of the Bank of North Dakota, operated by the State, and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; making an appropriation therefor; and providing penalties for the violation of certain provisions thereof," enacted the year 1919 by the Sixteenth Session of the Legislative Assembly of North Dakota, being House Bill number 18, and also by Section 5, paragraph (g) of the Act entitled "An Act creating the Industrial Commission of North Dakota, authorizing it to conduct and manage on behalf of the State certain utilities, industries, enterprises and business projects, and defining its power and duties, and making an appropriation therefor," enacted in the year 1919 by the Sixteenth Session of the Legislative Assembly of North Dakota, being house bill No. 17 (Seventeen), and for the purpose of enabling the Industrial Commission to negotiate and sell such bonds, pursuant to the provisions of this Act and of said Section Five, paragraph (g) of the Act entitled as last above stated, being House Bill Number 17 of the Sixteenth Legislative Assembly of North Dakota in the year 1919; thereby to procure the fund to be designated as the capital of the Bank of North Dakota.

Section 4. In furtherance of the purposes declared by this Act it is hereby made the duty of the Governor and the State Treasurer, after the issue, execution, sealing and attestation of said bonds, to deliver them to the Industrial Commission in such denominations and amounts bearing interest at such rates, and running to such periods of maturity, as may be determined by the Governor, in his discretion, upon consideration of such recommendations as the Commission may make in regard thereto. The Industrial Commission is empowered, authorized and directed, in connection with and in addition to its other powers and duties, to act as the agent of the State for the negotiation, sale and delivery of said bonds. It shall sell them for cash in such manner and at such terms as in its sound discretion it shall deem most advantageous to the interests of the State. The Commission is hereby authorized to receive all moneys paid by buyers of said bonds, upon the sale thereof, and upon receipt of the purchase price to deliver to each purchaser the bonds by him purchased. Upon such delivery of bonds so purchased and paid for, the faith and credit of the State of North Dakota is pledged for the payment thereof, both principal and interest, to the lawful holder and owner thereof upon presentation for payment, according to law. The moneys so derived and received from the sale of said bonds shall constitute the fund to be designated as the capital of the Bank of North Dakota, and shall be so employed by the Industrial Commission. Nothing in this Act, however, shall be construed to prevent the purchase of any of said bonds with any funds in the Bank of North Dakota.

Section 5. From time to time the Industrial Commission shall, out of the earnings derived from the operation of the Bank of North Dakota, pay to the State Treasurer such moneys as the Commission shall deem available to devote to the purpose of paying said bonds and interest. In making such payment the Commission shall file a statement with the State Treasurer specifying the purpose of such payment. When moneys shall have been so paid to the State Treasurer, he shall apply the same to their specified purpose as hereinafter directed.

Section 6. At the time of each annual meeting of the State Board of Equalization hereafter, the Industrial Commission shall deliver to said Board an exact written statement of all bonds issued under the provisions of this Act outstanding at that time, including therein the dates of maturity interest, rates, and all other information proper to enable the Board intelligently to comply with the provisions of this Act in regard to tax levies. On the basis of such information, the State Board of Equalization shall annually levy a tax at the time other taxes are levied, sufficient in amount to pay such interest on said bonds as will become due during the year beginning
45 on the next ensuing first day of January, and said tax shall be collected in the same manner as other state taxes are collected. In determining, however, the amount of the tax sufficient for such purpose the Board of Equalization shall take into account whatever moneys, if any, shall then have been paid to the State Treasurer by the Industrial Commission, as provided by Section 5 of this Act, for the specific purpose of paying such interest. The Board of Equalization shall apply to the State Treasurer for information as to the amount of such moneys, and he shall forthwith supply the information requested. If the amount of such moneys shall equal or exceed the amount of the interest on said bonds payable during said year beginning on the next ensuing first day of January, then no tax shall be levied by the Board of Equalization for that purpose; but if the amount of such moneys shall be less than the amount of the interest on said bonds payable during said year, then the board of Equalization shall deduct the amount of said money in the possession of the Treasurer from the amount of the interest so payable, and shall levy the tax hereinbefore in this section provided for at least the difference between said amounts.

Section 7. Whenever it shall appear to the Board of Equalization from the information contained in any statement delivered to it by the Industrial Commission at any annual meeting of said Board, as provided in Section 6, above, that there will mature, within a period of five years, from such annual meeting, any of the bonds provided for in this Act the Board of Equalization shall thereupon, at such annual meeting, levy a tax in an amount equal to one fifth of the amount of the principal of such bonds; provided, however, that in determining the amount of such tax, the Board of Equalization shall take into account whatever moneys, if any, shall have been paid to the State Treasurer by the Industrial Commission for the specific purpose of paying the principal of said bonds when due, as provided

in section 5 of this Act. The Board of Equalization shall apply to the State Treasurer for information as to the amount of such moneys and as to the time when paid to him. If the amount of such moneys paid to the Treasurer since the date of the last proceeding tax levy made by the Board of Equalization shall equal or exceed one fifth of the amount of the bonds so to mature, then such tax shall not be levied; but if the amount of such moneys paid to the state Treasurer since the date of the last preceding tax levy shall be less than one fifth of the amount of said bonds so to mature, then the Board of Equalization shall deduct the amount of such moneys, so paid, from such one fifth of said bonds, and shall levy the tax, hereinbefore in this section provided for the difference. It is the intention of this Section to provide that in each of the last five years, before the maturity of any said bonds, a state tax shall be levied which, together with such moneys as shall during the next preceding year have been paid to the State Treasurer by the Industrial Commission for the purpose, shall be at least sufficient to pay one fifth part of the principal of said bonds.

Section 8. To identify and distinguish the funds provided and available for the payment of the bonds issued pursuant to this Act there is hereby created and established, as a part of the moneys of the State received and kept by the State Treasurer, a fund to be designated the "Bank Bond Payment Fund." All moneys received by the State Treasurer, whether from the proceeds of taxes, or from payments made by the Industrial Commission, or from legislative appropriation, or otherwise, which shall be by law or by other authoritative designation made applicable to the payment of the said bonds, or interest thereon shall be by him kept in said fund distinct from all other moneys, and shall be disbursed by him only for the particular purpose or purposes for which such moneys shall be delivered to him; and no other appropriation shall ever be made of the moneys in said fund until the said bonds shall be fully paid. But this Act shall not be construed as preventing the State Treasurer from depositing said funds in the Bank of North Dakota, as provided by law with respect to all public funds.

47 Section 9. There is hereby appropriated, all of the money obtained as proceeds of the taxes provided for in sections 6 and 7 above, and all moneys paid to the State Treasurer by the Industrial Commission as specified in Section 5 above, and all money constituting the bank Bond Payment Fund, or so much thereof as may be from time to time necessary, to pay the interest, and principal upon the said bonds as payments thereon shall become due and whenever any of said bonds or any coupons thereon shall become due, shall be presented for payment, the State Treasurer shall pay the same out of the fund applicable thereto. If for any reason the said fund shall for the time being, be insufficient, the Treasurer shall supply the deficiency out of any other available moneys of the state in his custody; but in that case he shall as soon as possible, out of the Bank Bond Payment Fund, return the amount of such deficiency to the source whence taken.

Section 10. There is hereby appropriated out of the general funds, of the State, not otherwise appropriated, ten thousand dollars, or as much thereof as may be necessary to carry out the provisions of this Act. This appropriation is hereby made available immediately upon the passage and approval of this Act.

Section 11. This Act is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval; and the provisions of sections 6, 7, 8 and 9 hereof shall remain in full force and effect throughout the period of thirty-six years from and after the passage of this Act.

48 *North Dakota Real Estate Bond Act—Senate Bill #130.*

An Act.

Providing for the issuing of bonds of the State of North Dakota in a sum not exceeding Ten Million Dollars, to be known as "Bonds of North Dakota, Real Estate Series"; prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal on said bonds, and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure.

Be it enacted by the Legislative Assembly of the State of North Dakota:

Section 1. An issue of bonds of the State of North Dakota, to be known as "Bonds of North Dakota, Real Estate Series," is hereby authorized and directed under the conditions and in the manner and for the purposes hereinafter set forth.

Section 2. Whenever first mortgages upon real estate, such as are authorized by the Act entitled "An Act declaring the purpose of the State of North Dakota to engage in the banking business and establishing a system of banking under the name of the Bank of North Dakota, operated by the State, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management; making an appropriation therefor; and providing penalties for the violation of certain provisions thereof," enacted in the year 1919 by the Sixteenth Session of the Legislative Assembly of North Dakota, being House Bill No. 18, hereinafter called the Bank Act, shall be held by the Bank of North Dakota, securing a total amount of unpaid mortgage loans in the sum of at least one hundred thousand dollars; the Industrial Commission may cause such mortgagee or such of them as it shall think proper but not less than in the total amount of one hundred thousand dollars,

49 to be assigned, together with the obligations thereby secured, to the State Treasurer. The assignment of each such mortgage and obligation shall be executed by the Manager of the Bank and shall recite that it is made to "The State Treasurer of North Dakota and his successors in office in trust as security for bonds to

be issued by the State of North Dakota under the designation of Bonds of North Dakota, Real Estate Series, as provided by law;" and it shall be duly recorded by said Manager in each county in which the lands affected by the mortgage are situated. As soon as such assignments are recorded, they, with the instruments assigned, shall be delivered to the State Treasurer, and at the same time the Manager of the Bank shall deliver to the State Treasurer, a verified statement showing the amount of the loan remaining unpaid on each such obligation secured by the mortgages so assigned and delivered.

Section 3. As soon as the State Treasurer shall receive said instruments, he shall notify the Governor, the State Auditor and the Secretary of State, who shall each immediately inspect them. Thereupon the State Treasurer shall immediately prepare for issue, and the Governor and the State Treasurer shall thereafter issue, negotiable bonds of the State of North Dakota in an amount not exceeding the amount of the outstanding loans secured by the mortgages delivered to and in the possession of the State Treasurer, as above provided. Each of the bonds so issued shall contain a recital that it is issued and that it is secured by real estate first mortgages deposited with the State Treasurer of North Dakota, in pursuance of the provisions of this Act, which may be cited as the "Real Estate Bond Act of North Dakota." Said bonds shall be executed by the Governor and the State Treasurer under the great seal of the State and shall be attested by the Secretary of State. The Auditor and Secretary of State shall endorse and sign on each such bond, when issued, a certificate showing that it is issued pursuant to law and is within the debt limit. The bonds so issued shall be designated "Bonds of North Dakota, Real Estate Series."

50 Section 4. The bonds so issued shall be payable to the purchaser or bearer; provided, however, that the provisions of section 151 Compiled Laws of 1913, are hereby declared to apply to them. They shall be issued in denominations of from five dollars to ten thousand dollars, and shall be payable in not less than ten or more than thirty years from the passage of this Act; provided, however, that at the option of the Industrial Commission they shall be payable at any time after five years from the date of their issue, upon public notice given by the Industrial Commission that they shall mature and become payable at a date not less than one year from the time of the giving of such public notice. They shall bear interest at a rate not exceeding six per cent per annum from their date until maturity, payable semiannually on the first day of January and of July in each year; and coupons shall be attached to each bond, evidencing the amount of interest payable at each first day of January and July until maturity. Principal and interest shall be payable at the office of the State Treasurer in Bismarck. The terms of said bonds, as to value of demoninations, periods of maturity and rates of interest shall be fixed by the commission in its sound judgment, within the limitations above stated. Every such bond and coupon must be presented for payment at the office of the State Treasurer within six years from the date of its maturity; and no such bond or

coupon shall bear interest after maturity unless payment thereof shall not be made upon due presentation for payment.

Section 5. The said issue of bonds is authorized for the purpose of making delivery thereof to the Industrial Commission of North Dakota, as hereinafter provided, to the end that the said Commission may, by negotiation and sale of said bonds, procure necessary funds for the Bank of North Dakota thus replacing in said bank the funds employed by it from time to time in making loans upon first mortgages of real estate.

Section 6. In furtherance of the purpose declared by this Act, it is hereby made the duty of the Governor and the State Treasurer after the issue, execution, sealing and attestation of said bonds, to
51 deliver them to the Industrial Commission, in such denomination and amounts, bearing interest at such rates, and running to such period of maturity, as may be required by the Commission, within the limitations hereinbefore stated. The Industrial Commission is empowered, authorized and directed, in connection with and in addition to its other powers and duties, to act as the agent of the state for the negotiation, sale and delivery of said bonds. It shall sell them at not less than par value for cash in such manner and at such times as in its sound discretion it shall deem most advantageous to the interests of the State. The Commission is hereby authorized to receive all moneys paid by buyers of said bonds, upon the sale thereof, and upon receipt of the purchase price to deliver to each purchaser the bonds by him purchased. Upon such delivery of bonds so purchased and paid for, the faith and credit of the State of North Dakota is pledged for the payment thereof, both principal and interest to the lawful holder and owner thereof upon presentation for payment, according to law. The moneys so derived and received from the sale of said bonds shall be placed by the Industrial Commission in the funds of the Bank. Nothing in this Act, however, shall be construed to prevent the purchase of any said bonds with any funds in the Bank of North Dakota.

Section 7. After such assignment of any mortgage, and the obligation thereby secured, all payments accruing thereon shall be made to the State Treasurer. He shall hold and use said mortgages, obligations and the moneys paid thereon, in trust, first, for the security and payment of the bonds to be issued as herein provided, and second, for redelivery to the bank of such remaining part or balance thereof as may come within the provisions hereinafter stated. He shall keep said moneys in a separate fund designated the "Real Estate Bond Payment Fund," apart from all other funds in his possession; and the provisions of section 7 of the Bank act shall
52 not apply thereto. He shall also keep in said fund, as a part thereof, for the same purpose and in the same manner and under the same conditions, all moneys received by him, whether from the proceeds of taxes, or from payments made by the Industrial Commission, or from legislative appropriations, or otherwise; which shall be by law or by other authoritative designation made applicable to the payment of the said bonds *sm* or interest

thereon. No other disposition, by appropriation or otherwise, shall ever be made of the moneys in said funds until said bonds shall be fully paid, or until the time limit by law for the payment thereof shall have expired; provided, however, that if any of said bonds issued and delivered to the Industrial Commission, as hereinbefore provided, shall be returned to the State Treasurer, not sold, then such returned bonds shall be deemed a part of the bond issue secured by such fund.

Section 8. The State Treasurer shall pay the interest on said bonds upon presentment to him of the coupons for such interest when due and shall redeem said bonds upon their maturity by paying the principal thereof, all such payments being made from the Real Estate Bond Payment Fund, without auditor's warrant. Each payment so made, in addition to other accounting as provided by law, shall be reported to the Bank of North Dakota. All moneys in said fund, or as much thereof as may be necessary, are hereby appropriated for the payment of the interest and the principal of said bonds, and this appropriation shall not be repealed and no provision made in this Act for the payment of said bonds and interest shall be discontinued until the debt evidenced by said bonds both principal and interest, shall have been paid.

Section 9. If the obligation secured by any such mortgage so assigned to the State Treasurer shall not be performed according to its terms by the mortgagor, by payment or otherwise, or if any condition expressed in any such mortgage shall not be duly performed and kept according to its terms, the State Treasurer shall proceed to exercise the rights conferred upon him as the assignee of said mortgage, though the enforcements of its terms by
53 foreclosure or otherwise, for realising upon or protecting the security afforded by said mortgage or for collecting the amount of the obligation thereby secured. If in so doing it shall become necessary for the State Treasurer to purchase the property mortgaged, he shall take title thereto as State Treasurer, and as Trustee, in trust for the security for payment of said bonds; and if title to any such mortgaged lands shall be perfected in any State Treasurer by virtue of said purchase, he shall apply to the District Court of the county in which said lands are situated for direction as to the further performance of the duties of his trust in the premises. The cash proceeds derived from the possession, use or sale of any such lands shall become a part of the said Real Estate Bond Payment Fund.

Section 10. If while any mortgage so assigned to the State Treasurer is in his hands, the note or obligation thereby secured shall have been fully paid according to its terms, the State Treasurer shall immediately so certify to the Manager of the Bank. The State Treasurer shall also give information to the Bank as to any proceedings which he may from time to time take respecting the enforcement and collection of the securities so assigned to him, not paid according to their terms.

Section 11. The State Treasurer shall from time to time, at the request of the Bank of North Dakota, give information as to the amount of cash balance in his hands credited to said Real Estate Bond Payment Fund. If such balance shall include funds received by him upon the payment of the principal sum loaned upon any such mortgage; the bank may, to the extent of such principal sums so paid, substitute therefor new mortgages by assignment thereof, together with the obligation thereby secured, in the same manner and to the same effect as in the case of the mortgages and obligations originally assigned as the basis of the issue of such bonds, the State Treasurer shall pay to the Bank the amount thereof, and such mortgage so substituted shall become and continue a part
54 of the body of said trust, the same as the mortgages and obligations originally assigned to the State Treasurer therefor; provided, however, that unless the amount of the mortgages in such fund falling due before bonds secured thereby is sufficient to pay such bonds, the Treasurer shall reserve sufficient cash for that purpose.

Section 12. All said bonds shall be exempt from state, county and municipal taxes of any and all kinds.

Section 13. If at the time of the annual meeting of the State Board of Equalization, the moneys in the Real Estate Bond Payment Fund shall appear to the State Treasurer to be insufficient to meet the payments of interest or principal upon said bonds accruing within a period of one year thereafter, he shall so inform the State Board of Equalization, which shall thereupon proceed to include in the annual tax levy, such tax as in its judgment shall be necessary to meet the indicated deficiency, and the proceeds of such tax shall be placed by the State Treasurer in said fund.

Section 14. Whenever it shall appear that there are in said Real Estate Bond Payment Fund, funds which, with the mortgage securities, on hand are more than sufficient to provide for the payment of all bonds and interest thereon outstanding, the excess of such funds required for that purpose shall be paid by the State Treasurer to the Bank of North Dakota, if so directed by the Industrial Commission.

Section 15. The powers herein granted may be repeatedly exercised and the duties following thereupon shall be likewise repeatedly performed from time to time as occasion may arise under the terms of this Act; provided, however, that at no time shall the amount of bonds issued and outstanding pursuant to the terms of this Act exceed the total of ten million dollars.

Section 16. There is hereby appropriated out of the general funds of the State, not otherwise appropriated, ten thousand dollars, or so much thereof as may be necessary, to carry out the provisions of this act. This appropriation is hereby declared
55 to be immediately available upon the passage and approval of this Act.

Section 17. This Act is hereby declared to be an emergency measure, and shall take effect and be in force from and after its passage and approval.

Mill and Elevator Association Act—Senate Bill # 20.

An Act

Declaring the purpose of the State of North Dakota to engage in the business of manufacturing and marketing of farm products, and for establishing a warehouse, elevator, and flour mill system under the name of North Dakota Mill and Elevator Association operated by the state, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management; and making an appropriation therefor.

Be it enacted by the Legislative Assembly of the State of North Dakota:

Section 1. That for the purpose of encouraging and promoting agriculture, commerce and industry, the State of North Dakota shall engage in the business of manufacturing and marketing farm products and for that purpose shall establish a system of warehouses, elevators, flour mills, factories, plants, machinery and equipments, owned, controlled and operated by it under the name of North Dakota Mill and Elevator Association hereinafter for convenience called the Association.

Section 2. The Industrial Commission shall operate, manage, and control the Association, locate and maintain its place of business, and shall make and enforce orders, rules regulations and by-laws for the transaction of its business. The business of the Association, in addition to other matters herein specified, may include anything that any private individual or corporation may lawfully do in conducting a similar business except as herein restricted. The Industrial Commission shall meet within twenty days after the passage and approval of this Act to begin the organization of the Association.

56 Section 3. To accomplish the purposes of this act, the Industrial Commission shall acquire by purchase, lease, or by exercise of right of eminent domain, as provided by Chapter 36 of the Code of Civil Procedure, Compiled Laws of 1913, all necessary property or property rights, and may construct remodel or repair all necessary buildings; and may purchase, lease, construct, or otherwise acquire, warehouses, elevators, flour mills, factories, offices, plants, machinery equipments and all other things necessary, incidental or convenient in the manufacturing and marketing of all kinds of raw and finished farm products within or without the state and may dispose of the same; and may buy, manufacture, store, mortgage, pledge, sell, exchange or otherwise acquire or dispose of all kinds of manufactured and raw farm and food products

and by-products, and may for such purposes establish and operate exchanges, bureaus, markets and agencies, within or without the State, including foreign countries, on such terms and conditions, and under such rules and regulations as the Commission may determine.

Section 4. The Industrial Commission shall obtain such assistance as in its judgment may be necessary for the establishment, maintenance and operation of the Association. To that end it shall appoint a manager, and may appoint such subordinate officers and employees as it may judge expedient. It may constitute such manager its general agent in respect to the functions of the association, but subject, nevertheless, in such agency, to the supervision, limitation and control of the Commission. It shall employ such contractors, architects, builders, attorneys, clerks, accountants, and other experts, agents and servants as in the judgment of the Commission the interests of the state may require, and shall define the duties, designate the titles, and fix the compensation and bonds of all such persons so engaged; provided, however, that subject to the control and regulation of the Commission, the Manager of the Association shall appoint and employ such deputies and other subordinates, and such contractors, architects, builders, attorneys, clerks, accountants and other
57 experts, agents and servants as he shall, in his judgment, deem are required by the interests of the association. The total compensation of such appointees and employees, together with other expenditures for the operation and maintenance of the Association, shall remain within the appropriation and earnings lawfully available in each year for such purpose. All officers and employees of the Association engaged upon its financial functions shall, before entering upon their duties, respectively furnish good and sufficient bonds to the state in such amount and upon such conditions as the commission may require and approve; but the bond of the Manager shall not be less than fifty thousand dollars. Such bonds shall be filed with the Secretary of State.

Section 5. The Industrial Commission may remove and discharge any and all persons appointed in the exercise of the powers granted by this Act, whether by the Commission or by the Manager of the association, and any such removal may be made whenever in the judgment of the Commission the public interests require it; provided, however, that all appointments and removals contemplated by this Act shall be so made as the Commission shall deem most fit to promote the efficiency of the public service.

Section 6. The Industrial Commission shall fix the buying price of all things bought, and the selling price of all things sold, incidental to the operation of the Association, and shall fix all charges for any and all services rendered by the Association; but in fixing these prices—while all services are to be rendered as near as may be at cost—there shall be taken into consideration in addition to other necessary costs, a reasonable charge for depreciation of all property, all over-head expenses and a reasonable surplus, together with all

amounts required for the repayment, with interest of funds received from the state.

Section 7. All business of the Association may be conducted under the name of "North Dakota Mill and Elevator Association."

58 Title to property pertaining to the operation of the Association may be obtained and conveyed in the name of "The State of North Dakota, doing business as the North Dakota Mill and Elevator Association." Written instruments shall be executed in the name of the State of North Dakota, signed by any two members of the Industrial Commission, of whom the Governor shall be one, or by the manager of the Association, within the scope of his authority so to do as defined by the Industrial Commission.

Section 8. Civil actions may be brought against the State of North Dakota on account of causes of action claimed to have arisen out of transactions, connected with the operation of the association upon conditions that the provisions of this section are complied with. In such actions the state shall be designated as "The State of North Dakota, doing business as North Dakota Mill and Elevator Association", and the service of process therein shall be made upon the manager of the association. Such actions may be brought in the same manner and shall be subject to the same provisions of law as other civil actions brought pursuant to the provisions of the Code of Civil Procedure. Such actions shall be brought, however, in the county where the Association shall have its principal place of business, except as provided in Sections 7405, 7416 and 7418 Compiled Laws of North Dakota, 1913. The provisions of sections 375 and 657 of the Compiled Laws of 1913 shall not apply to claims against the State, affected by the provisions of this action.

Section 9. There is hereby appropriated, to carry out the purposes of this act, all moneys raised by the mill tax for terminal elevators as provided in sections 2072 and 2073 of the Compiled Laws of 1913. Said moneys shall be paid to the Manager of said Association and he shall place the said moneys in the general funds of the Association.

Said money, together with any funds that shall be procured

59 by the Industrial Commission through the sale of state bonds, as may be provided by law for that purpose shall be designated as the capital of the Association.

Section 10. The State Examiner shall personally or through deputy examiners visit the Association at least twice annually, and shall inspect and verify the assets in its possession and under its control, with sufficient thoroughness of investigation to ascertain with reasonable certainty whether the valuations are correctly carried on its books. He shall report the results of such examination and investigation to the Industrial Commission as soon as practicable, and to the Legislative Assembly at its next ensuing session.

Section 11. This Act is hereby declared to be an emergency, measure, and shall take effect and be in force from and after its passage and approval.

*Mill and Elevator Association Bond Act—Senate Bill #75.**AN ACT.*

Providing for the issuing of bonds of the State of North Dakota in a sum not exceeding Five Million Dollars to be known as "Bonds of North Dakota, Mill and Elevator Series"; prescribing the terms and stating the purpose thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal of said bonds and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure.

Be it enacted by the Legislative Assembly of the State of North Dakota.

Section 1. The issuance of bonds of the State of North Dakota, to be known as "Bonds of North Dakota, Mill and Elevator Series," is hereby authorized and directed, under the conditions and in the manner and for the purpose hereinafter set forth.

Section 2. Whenever the Industrial Commission shall deem it expedient so to do, for the purpose of authorizing the issuance of bonds of the State of North Dakota as contemplated by this Act, it shall cause mortgages to be executed in the manner prescribed by Section 7 of the Act entitled "An Act declaring the purpose of the State of North Dakota to engage in the business of manufacturing and marketing of farm products, and for establishing a warehouse, elevator and flour mill system under the name of North Dakota Mill and Elevator Association operated by the State, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management; and making an appropriation therefor", enacted in the year 1919 by the Sixteenth Session of the Legislative Assembly of North Dakota, being Senate Bill No. 20. The grantee and mortgagee designated in said mortgages shall be "The State Treasurer of North Dakota and his successors in office in trust". Each mortgage shall be executed and delivered to the Treasurer of North Dakota and his successors in office, in trust as security for bonds to be issued by the State of North Dakota under the designation of "Bonds of North Dakota, Mill and Elevator Series," as provided by law, and shall contain a recital to that effect. The property described in and covered by said mortgages shall be such property as is owned by or may be acquired for the State of North Dakota, doing business as North Dakota Mill and Elevator Association and dedicated to or acquired for the use thereof by the Industrial Commission. All property dedicated to or acquired for the state of North Dakota doing business as North Dakota Mill and Elevator Association shall be described in and covered by first mortgages so that at all times all of the property of the State of North Dakota doing business as North Dakota Mill and Elevator Association shall be pledged to the payment of all of the funds issued, sold, and

delivered under the provisions of this Act, and attached to each of said mortgages, and incorporated by reference into the provisions thereof, shall be an itemized statement of all of the property
61 specified and covered therein, showing the true value of each item thereof based upon appraisal made under the direction of the Industrial Commission and verified by the oath of the appraisers. Said mortgage shall be a first lien upon all of said property without prior lien or incumbrance of any kind whatsoever.

Section 3. Said mortgages shall be duly recorded in each county in which the property affected thereby is situated. As soon as such mortgages are recorded they shall be delivered to the State Treasurer, and be retained by the State Treasurer and his successors in office in trust until all of the bonds secured thereby as provided by this Act shall be paid.

Section 4. As soon as the State Treasurer shall receive such mortgages so recorded he shall notify the Governor, the State Auditor and the Secretary of State, who shall thereupon immediately inspect them, and upon ascertaining from such examination and inspection that said mortgages have been properly executed and duly recorded, it shall be the duty of the State Treasurer to immediately prepare for issue, and the Governor and State Treasurer shall thereafter issue, negotiable bonds of the State of North Dakota in an amount not exceeding the value of the property included within the terms of said mortgages as expressed in the itemized statements and valuation attached to said mortgages, as provided in Section 2 of this Act. Each of the bonds so issued shall contain a recital that it is secured by first mortgages deposited with the State Treasurer of North Dakota upon property of the State, dedicated to the use of the North Dakota Mill and Elevator Association; that it is issued in pursuance of the provisions of this Act, which may be cited as the "Mill and Elevator Bond Act of North Dakota." Said bonds shall be executed by the Governor and the State Treasurer under the great seal of the State, and shall be attested by the Secretary of State. The Auditor
and Secretary of State shall endorse and sign on each such
62 bond, when issued, a certificate showing that it has been issued pursuant to law and is within the debt limit. The bonds so issued shall be designated "Bonds of North Dakota, Mill and Elevator Series," and may be issued in series from time to time as the Industrial Commission may by order designate and require.

Section 5. The bonds so issued shall be payable to the purchaser or bearer; provided, however, that the provisions of Section 151, Compiled Laws of 1913, are hereby declared to apply to them. They shall be issued in denominations of from five dollars to ten thousand dollars, and shall be payable in not less than ten or more than thirty years from the passage of this Act. They shall bear interest at the rate of not exceeding six per cent per annum from their date until maturity, payable semi-annually on the first day of January and of July in each year; and coupons shall be attached to each bond, evidencing the amount of interest payable at each first day of January and July until maturity. Principal and interest shall be payable

at the office of the State Treasurer in Bismarck. The terms of said bonds, as to value of denominations, and rates of interest, shall be fixed by the Commission on its sound judgment, within the limitations above stated. Every such bond and coupon must be presented for payment at the office of the State Treasurer within six years from the date of its maturity; and no such bond or coupon shall bear interest after maturity unless payment thereof shall not be made upon due presentation for payment.

Section 6. The said bonds so issued shall be delivered to the Industrial Commission of North Dakota to the end that the said Commission may by negotiation and sale of said bonds procure necessary funds for the operation of said association.

Section 7. In furtherance of the purpose declared by this Act, it is hereby made the duty of the Governor and the State Treasurer after the issue, execution, sealing and attestation of said bonds to deliver them to the Industrial Commission, in such denominations and amounts, bearing interest at such rates, and running to such period of maturity, as may be required by the Commission, within the limitations herein stated. The Industrial Commission is empowered, authorized and directed, in connection with and in addition to its other powers and duties, to act as the agent of the state for the negotiation, sale and delivery of said bonds. It shall sell them for each at not less than par value in such manner and at such time in its sound discretion it shall deem most advantageous to the interests of the state. The commission is hereby authorized to receive all moneys paid by buyers of said bonds, upon the sale thereof, and upon receipt of the purchase price to deliver to each purchaser the bonds by him purchased. Upon such delivery of bonds so purchased and paid for, the faith and credit of the State of North Dakota is pledged for the payment thereof, both principal and interest, to the lawful holder and owner thereof upon presentation for payment, according to law. The moneys so derived and received from the sale of said bonds shall be placed by the Industrial Commission in the funds of the Association. Nothing in this Act, however, shall be construed to prevent the purchase of any said bonds with any funds in the Bank of North Dakota.

Section 8. The State Treasurer and his successors in office shall hold such mortgages, first, for the security and payment of the bonds issued as provided in this Act, and second, for the satisfaction and cancellation thereof, and re-delivery to the Industrial Commission, if and when said bonds have been fully paid.

Section 9. From time to time the Industrial Commission shall, out of the earnings derived from the operation of the Association, pay to the State Treasurer such moneys as the Commission shall deem available to devote to the purpose of paying said bonds and interest. In making such payment the Commission shall file a statement with the State Treasurer specifying the purpose of such payment. When moneys shall have been so paid to the State Treasurer, he shall apply the same to their specified purpose as hereinbefore directed.

64 Section 10. At the time of each annual meeting of the State Board of Equalization hereafter, the Industrial Commission shall deliver to said Board an exact written statement of all bonds issued under the provisions of this Act outstanding at that time, including therein the dates of maturity, interest rates and all other information proper to enable the board intelligently to comply with the provisions of this act in regard to tax levies. On the basis of such information, the State Board of Equalization shall annually levy a tax, at the time other taxes are levied, sufficient in amount to pay such interest on said bonds as will become due during the year beginning on the next ensuing first day of January, and said tax shall be collected in the same manner as other state taxes are collected. In determining, however, the amount of the tax sufficient for such purpose the Board of Equalization shall take into account whatever moneys, if any, shall then have been paid to the State Treasurer by the Industrial Commission, as provided in this act, for the specific purpose of paying such interest. The Board of Equalization shall apply to the State Treasurer for the information as to the amount of such moneys, and he shall forthwith supply the information requested. If the amount of such moneys shall equal or exceed the amount of the interest on said bonds payable during said year beginning on the next ensuing first day of January, then no tax shall be levied by the Board of Equalization for that purpose; but if the amount of such moneys shall be less than the amount of the interest on said bonds payable during said year, then the Board of Equalization shall deduct the amount of said moneys in the possession of the treasurer from the amount of the interest so payable, and shall levy the tax hereinbefore in this section provided for at least the difference between said amounts.

65 Section 11. Whenever it shall appear to the Board of Equalization from the information contained in any statement delivered to it by the Industrial Commission at an annual meeting of said Board, as provided, in Section 10 above that there will mature, within a period of five years from such annual meeting, any of the bonds provided for in this Act, the Board of Equalization shall thereupon, at such annual meeting, levy a tax in an amount equal to one fifth of the amount of the principal of such bonds; provided however, that in determining the amount of such tax, the Board of Equalization shall take into account whatever moneys, if any, shall have been paid to the State Treasurer by the Industrial Commission for the specific purpose of paying the principal of said bonds when due, as provided in Section 9 of this Act. The Board of Equalization shall apply to the State Treasurer for information as to the amount of such moneys and as to the times when paid to him. If the amount of such moneys paid to the treasurer since the date of the last preceding tax levy made by the Board of Equalization shall equal or exceed one fifth of the amount of the bonds so to mature, then such tax shall not be levied; but if the amount of such moneys, paid to the State Treasurer since the date of the last preceding tax levy, shall be less than one fifth of the amount of said bonds so to mature, then the Board of Equalization shall deduct the amount of such moneys

paid, from such one fifth of said bonds, and shall levy the tax, hereinbefore in this section provided, for the difference. It is the intention of this section to provide that in each of the last five years, before the maturity of any of said bonds, a state tax shall be levied which, together with such moneys as shall during the next preceding year have been paid to the State Treasurer by the Industrial Commission for the purpose, shall be at least sufficient to pay one fifth of the principal of said bonds.

Section 12. To identify and distinguish the funds provided and available for the payment of the bonds issued pursuant to this Act, there is hereby created and established as a part of the moneys of the state received and kept by the State Treasurer, a fund to be designated the "Mill and Elevator Bond Payment Fund." All moneys received by the State Treasurer whether from the proceeds of taxes, or from payments made by the Industrial Commission, or from legislative appropriation, or otherwise, which shall be by law or by other authoritative designation made applicable to the payment of the said bonds, or interest thereon, shall be by him kept in said fund distinct, from all other moneys, and shall be disbursed by him only for the particular purpose or purposes for which such moneys shall be delivered to him; and no other appropriation shall ever be made of the moneys in said fund until the bonds shall be fully paid. But this act shall not be construed as preventing the State Treasurer from depositing said funds in the Bank of North Dakota, as provided by law with respect to all public funds.

Section 13. There is hereby appropriated, all of the moneys obtained as proceeds of the taxes provided for in sections 10 and 11 above, and all moneys paid to the State Treasurer by the Industrial Commission as specified in Section 9 above, and all moneys constituting the Mill and Elevator Bond Payment Fund, or so much thereof as may be from time to time necessary, to pay ~~the~~ interest and principal upon the bonds as payments thereon, shall become due; and whenever any of said bonds, or any coupons thereon, being due, shall be presented for payment, the State Treasurer shall pay the same out of the fund applicable thereto. If for any reason the said fund shall, for the time being, be insufficient, the Treasurer shall supply the deficiency out of any other available moneys of the state in his custody; but in that case he shall as soon as possible, out of the Mill and Elevator Bond Payment Fund, return the amount of such deficiency to the source whence taken.

Section 14. The State Treasurer shall pay the interest on said bonds upon presentation to him of the coupons for such interest when due, and shall redeem said bonds upon their maturity by paying the principal thereof, all such payments being made from the Mill and Elevator Bond Payment Fund, without auditor's warrant. Each payment so made, in addition to other accounting as provided by law; shall be reported to the said Association. All moneys in said fund, or as much thereof as may be necessary, are

67 hereby appropriated for the payment of the interest and the principal of said bonds, and this appropriation shall not be repealed, and no provisions made in this Act for the payment of said bonds and interest shall be discontinued until the debt evidenced by said bonds both principal and interest, shall have been paid.

Section 15. The powers herein granted may be repeatedly exercised and the duties following thereupon shall be likewise repeatedly performed from time to time as occasion may arise under the terms of this act; provided, however, that at no time shall the amount of bonds issued and outstanding pursuant to the terms of this act, exceed the total of Five Million Dollars.

Section 16. All said bonds shall be exempt from state, county and municipal taxes of any and all kinds.

Section 17. There is hereby appropriated out of the general funds of the state, not otherwise appropriated, ten thousand dollars or as much thereof as may be necessary, to carry out the provisions of this Act. This appropriation is hereby declared to be immediately available upon the passage and approval of this Act.

Section 18. This Act is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval.

Home Building Act—Senate Bill No. 19.

An Act

Declaring the purpose of the State of North Dakota to engage in the enterprise of providing homes for residents of this state and to that end to establish a business system operated by the State under the name of The Home Building Association of North Dakota, and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; and making an appropriation therefor.

Be it enacted by the Legislative Assembly of the State of North Dakota:

68 Section 1. For the purpose of promoting home building and ownership, the State of North Dakota shall engage in the enterprise of providing homes for residents of the State and to that end it shall and does hereby establish a business system operated by the State under the name of The Home Building Association of North Dakota, hereinafter for convenience called the Association.

Section 2. The Industrial Commission of North Dakota shall operate, manage and control the Association and shall locate and maintain its places of business, of which the principal place shall be within the State, and shall make and enforce orders, rules, regulations and by-laws for the transaction of its business.

Section 3. To accomplish the purposes of this Act the Industrial Commission shall acquire by purchase, lease or exercise of the right of eminent domain, as provided by Chapter 36 of the Code of Civil Procedure, Compiled Laws of 1913, all requisite property and property rights, and may construct, repair and remodel buildings, having strict regard for economy in the administration of its affairs.

Section 4. The Industrial Commission shall obtain such assistance as in its judgment may be necessary for the establishment, maintenance and operation of the Association. To that end it shall appoint a Manager, and may appoint such subordinate officers and employees as it may judge expedient. It may constitute such Manager its general agent, in respect to the functions of the Association, but subject, nevertheless, in such agency, to the supervision, limitation and control of the Commission. It shall employ such contractors, architects, builders, attorneys, clerks, accountants and other experts, agents and servants as in the judgment of the Commission the interest of the State may require and shall define the duties, designate the title, and fix the compensation and bonds of all such persons so engaged; provided, however, that subject to the control and regulation of the Commission, the Manager of the Association shall appoint and employ such deputies and other subordinates, and such contractors, architects, builders, attorneys, clerks, accountants and other experts, agents and servants, as he shall in his judgment, deem are required by the interest of the Association. The total compensation of such appointees and employees, together with other expenditures for the operation and maintenance of the association shall remain within the appropriation and earnings lawfully available in each year for such purpose. All officers and employees of the Association engaged upon its financial functions shall, before entering upon their duties, respectively furnish good and sufficient bonds to the State in such amount and upon such conditions as the Commission may require and approve; but the bond of the Manager shall not be less than fifty thousand dollars. Such bonds shall be filed with the Secretary of State.

Section 5. The Industrial Commission may remove and discharge any and all persons appointed in the exercise of the powers granted by this act, whether by the Commission or by the Manager of the Association, and any such removal may be made whenever in the judgment of the Commission the public interests require it; provided, however, that all appointments and removals contemplated by this Act shall be so made as the Commission shall deem most fit to promote the efficiency of the public service.

Section 6. Whenever funds shall be available, derived from the sale of bonds issued by the State and delivered to the Industrial Commission for negotiations to carry on the business of the Association; or derived from appropriations made by the Legislative Assembly for such purpose; or derived from deposits received by the Association as hereinafter provided, or derived from payments

made for homes by purchasers thereof, such funds shall be used, under proper regulations of the Industrial Commission, for investment in building or purchasing homes within the State for members of the Home Builders' League, as such Leagues are hereinafter defined. No home shall be built, or purchased and sold, at a price to exceed five thousand dollars except in case of a farm house, in which case the selling price shall not exceed ten thousand
70 dollars. The word "home" as herein used, shall mean a dwelling house, within or adjacent to a town, village or city, together with such equipments as are customarily used in connection with a dwelling house. The words "farm home" as herein used, shall mean a tract of agricultural land together with a dwelling house, a barn, and such other farm buildings and equipments as are customarily used in connection with a farm home.

Section 7. The Association shall make a specialty of building standardized houses, barns and other buildings and equipments provided for herein. For its uses the Industrial Commission may acquire suitable tracts of land, by purchase or by the exercise of the right of eminent domain, deemed by the Commission suitable to accomplish the purposes of this Act; and may subdivide such land into lots, and lay out streets, sidewalks, parks and gardens therein, and build homes on said lots, as provided for herein, and supply them with water, light and heat.

Section 8. Any person may open a home buying account with the Association by applying in person by mail or through a Home Buyers' League, a trade union, a woman's club or other recognized industrial, social or civic body. Special efforts shall be made to secure deposits from children, young people, renters and wage earners in order that more people may own their own homes. Any such deposits, together with interest, may be withdrawn upon six months' notice.

Section 9. The Industrial Commission shall fix the rate of interest on all deposits and loans, and the charges for all services rendered by the Association, but no interest rate allowed or received shall exceed six per cent per annum.

Section 10. Ten or more depositors in the Association may form themselves into a local body to be known as a Home Buyers' League. Every such Home Buyers' League must be authorized, registered and numbered in the office of the Association and it shall be governed by such rules and regulations as may be presented by the Industrial
Commission. No person shall become a member of a Home
71 Buyers' League without the written consent of all the other members, which shall be filed and recorded in the office of the Association.

Section 11. Each Homebuyers' League shall elect a Secretary-Treasurer who shall perform the duties usual to such office, and shall be its executive officer. He shall also be the agent of the Association and shall perform such other duties as the Industrial Commission may prescribe.

Section 12. Whenever a member of a Home Buyers' League shall have deposited with the Association a sum equal to twenty per cent of the total selling price of a home or farm home, the Association shall, upon his application purchase or build such home or farm home and convey it to him upon a cash payment of twenty per cent, the balance to be secured by a purchase money mortgage on the property, and to be paid on an amortization plan by means of a fixed number of monthly installments sufficient to cover, first a charge on the loan at a rate to be determined by the Industrial Commission, second, a charge for administration and surplus at a rate not exceeding one per cent per annum on the unpaid principal, said two rates combined constitute the interest rate on the deferred payments; and, third, such amounts to be applied on the principal as will extinguish the debt within an agreed period, not less than ten or more than twenty years. Additional payments in sums of twenty-five dollars or any multiple thereof, for the reduction of the amount of the unpaid principal, or the payment of the entire principal, may be made on any regular installment date, under the rules and regulations of the Industrial Commission. In case of any accident, crop failure, or other event which reduces the buyers' reasonable income by one half, all payments under such contract may in the discretion of the Industrial Commission, be extended from time to time for a period of one year; provided, however, that on the payment of all installments such further annual payment shall be payable as will pay the interest with interest thereon, for the years for which no payments were made.

Section 13. Each member of every Home Buyers' League shall be jointly and severally liable for all contracts, debts and obligations due the Association from his League, to the extent of fifteen per cent of the price at which his home was sold to him.

Section 14. All funds of the Association shall be deposited in the Bank of North Dakota, and disbursed through it.

Section 15. All business of the Association may be conducted under the name of "The Home Building Association of North Dakota." Title to property pertaining to the operation of the Association shall be obtained and conveyed in the name of "The State of North Dakota, doing business as the Home Building Association of North Dakota." Written instruments shall be executed in the name of the State of North Dakota, signed by any two members of the Industrial Commission, of whom the Governor shall be one, or by the Manager of the Association within the scope of his authority so to do as defined by the Industrial Commission.

Section 16. Civil actions may be brought against the State of North Dakota on account of causes of action claimed to have arisen out of transactions connected with the operation of the Association upon condition that the provisions of this Section are complied with. In such actions the State shall be designated as "The State of North Dakota, doing business as the Home Building Association," and the

service of process therein shall be made upon the manager of the Association. Such actions may be brought in the same manner and shall be subject to the same provisions of law as other civil actions brought pursuant to the provisions of the Code of Civil Procedure. Such actions shall be brought, however, in the county where the Association shall have its principal place of business, except as provided in sections 7415, 7416 and 7418, Compiled Laws of North Dakota, 1913. The provisions of Sections 375 and 657 of the Com-

73 piled Laws of 1913 shall not apply to claims against the State affected by the provisions of this Section.

Section 17. The State Examiner shall personally or through deputy examiner visit the Association at least twice annually, and shall inspect and verify the assets in its possession and under its control with sufficient thoroughness of investigation to ascertain with reasonable certainty whether the valuations are correctly carried on its books. He shall report the results of such examination and investigation to the Industrial Commission as soon as practicable, and to the Legislative Assembly at its next ensuing session.

Section 18. There is hereby appropriated out of the General Funds of the State, not otherwise appropriated, one hundred thousand dollars, or so much thereof as may be necessary, to carry out the provisions of this act. This appropriation is hereby made available immediately upon the passage and approval of this act. The Industrial Commission shall, out of the earnings of the Association make provision for accumulating a fund with which to replace in the general funds of the State, the amount received by the Commission under this appropriation, as may be directed by the Legislative Assembly.

73½

Motion to Dismiss.

Filed April 7, 1919.

(Title of Case.)

Now comes Lynn J. Frazier and John N. Hagen individually Lynn J. Frazier as Governor of the State of North Dakota; John N. Hagen as Commissioner of Agriculture and Labor of the State of North Dakota; and Lynn J. Frazier, William Langer and John N. Hagen, acting as the Industrial Commission of North Dakota, being certain of the defendants in the above entitled action and move the court to dismiss this action and that they take their costs in this suit incurred for the following reasons:

1. Because it appears in the complaint filed in this cause that there is insufficiency of fact to constitute a valid cause of action in equity against these defendants or any of them and that said complaint fails to allege facts constituting such cause of action.

2. Because it appears in the complaint filed in this cause that this Honorable Court has no jurisdiction of the subject matter of the pretended cause of action set forth in said complaint.

WILLIAM LEMKE,
Of Fargo, North Dakota,
Solicitor for said Defendants.

FREDERIC A. PIKE,
Of St. Paul, Minnesota,
Of Counsel.

Answer.

Filed April 15, 1919.

(Title of Case.)

The answer of the above named defendants, William Langer, Obert Olson, Thomas Hall, Minnie J. Neilson, and Carl Kozitsky as individuals, and William Langer, Lynn J. Frazier, Carl Kozitsky, Obert Olson and Thomas Hall as members of the State Auditing Board of the State of North Dakota, and William Langer, Thomas Hall, Carl Kozitsky, Lynn J. Frazier and Minnie J. Nielson, as members of the Board of University and School Lands of said state; William Langer as Attorney General of said State, Obert Olson, as State Treasurer of said state, Carl Kozitsky, as State Auditor of said state,

74 Thomas Hall, as Secretary of State of said state, and Minnie J. Nielson, as Superintendent of Public Instruction of said state; and William Langer, John N. Hagen and Lynn J. Frazier, as members of the Industrial Commission of North Dakota, to the Bill of Complaint exhibited against them by the above named plaintiffs.

These answering defendants now and at all times hereafter saving and reserving to themselves all and all manner of benefits and advantages, of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies, in the Bill of Complaint of plaintiffs contained, for answer thereunto, or unto so much or such parts thereof as these defendants are advised that it is material or necessary for them to make answer thereunto, answering say:

I.

These answering defendants allege that none of these defendants, and none of the other defendants named in this action, has any private or pecuniary interests in the subject matter of the action, either as individuals or in their several respective representative capacities.

II.

These defendants further answering, deny that this action is a suit in equity between plaintiffs and defendants as citizens of the State of North Dakota; and deny that the suit arises under the Constitution or any law of the United States.

III.

Further answering, these defendants allege that this action is a suit against defendants as duly elected, qualified, and acting public officials of the State of North Dakota, and as administrative agents of said state, and that this suit is in effect and purpose an action against the sovereign state of North Dakota, in which the relief sought is an interference with the state of North Dakota in the regular and orderly administration of its public affairs; and that the state of North Dakota has not consented to be sued in this action.

IV.

Further answering, these defendants allege that there is a non joinder of parties defendant in this action for the reason that the bill of complaint shows upon its face that the state of North Dakota is the real party in interest as a defendant herein, and that the rights and interests of the state of North Dakota will be affected by any judgment or decree herein, and is a necessary party defendant herein.

V.

Further answering, these defendants allege that the bill of complaint herein shows on its face that it does not state facts
75 sufficient to constitute a valid cause of action in equity.

VI.

Further answering, these defendants admit that each of the plaintiffs is a citizen of the United States and of the State of North Dakota and that each of the plaintiffs is the owner of real and personal property in said State, and in the county in which he resides, and that each of the plaintiffs is a tax payer of the state of North Dakota and that the residences of the several plaintiffs are correctly stated in the bill of complaint herein.

VII.

Further answering, these defendants admit that the defendants are citizens of the United States and of the state of North Dakota and are the duly elected, qualified and acting officers of the said state, as follows: Lynn J. Frazier, Governor, William Langer, Attorney General, John N. Hagen, Commissioner of Agriculture and Labor, Obert Olson, State Treasurer, Carl Kositzky, State Auditor, Thomas Hall, Secretary of State, and Minnie J. Nielson, Superintendent of Public Instruction; admit that under Section 375 of the Compiled Laws of North Dakota, the said Lynn J. Frazier, as Governor, Carl Kositzsky, as State Auditor, William Langer, as Attorney General, Obert Olson, as State Treasurer, and Thomas Hall, as Secretary of State, constitute the State Auditing Board, and as su

board audit all claims against the state prior to the issuance of the State Auditor's warrant on the Treasurer in payment thereof; admit that under Section 156 of the Constitution of North Dakota, Lynn J. Frazier, as Governor, William Langer, as Attorney General, Thomas Hall, as Secretary of State, Carl Kositzky, as State Auditor, and Minnie J. Nielson, as Superintendent of Public Instruction, constitute the Board of University and School Lands, and as such have control of the investment of the permanent school fund of this state derived from the rental and sale of all school and university lands granted to the state by the United States for the support of public schools; and that under Section 162 of the State Constitution are authorized to invest such funds in state bonds; that said fund now consists of \$919,730.16 in cash, \$10,276,964.00 in municipal bonds, \$5,661,253.61 in notes secured by mortgages on farm property within the state of North Dakota, and contracts for the purchase price of land sold upon contracts, and lands which have not yet been sold, and that the aggregate of said money and property equals or exceeds in value the sum of \$50,000,000.

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VIII.

Further answering, these defendants admit that the defendant, Obert Olson, as State Treasurer, is the custodian of the funds of the state derived from taxation, and is also custodian of the state school fund and disburses such school funds upon warrants drawn by the State Auditor; and admit that the defendant, Carl Kositzky, as State Auditor, directs the disbursements of the state funds by warrants upon the State Treasurer, and by his warrant directs the payment of the permanent school fund.

IX.

Further answering, these defendants allege that the defendant, Lynn J. Frazier, as Governor, John N. Hagen, as Commissioner of Agriculture and Labor, and William Langer, as Attorney General, constitute the Industrial Commission of North Dakota, pursuant to House Bill No. 17 passed by the Sixteenth Legislative Assembly of the State of North Dakota, as set forth in the bill of complaint herein, and have organized and are now acting as the Industrial Commission of North Dakota, pursuant to said Act of said Legislative Assembly; and further allege that said House Bill No. 17, as set out in full in the bill of complaint herein, was duly and regularly passed and adopted by the necessary vote of the Senate and the House of Representatives of the State of North Dakota, constituting the Sixteenth Legislative Assembly of the State of North Dakota, in compliance with and in the manner provided by the Constitution of the State of North Dakota, and was, on the 25th day of February, 1919, duly approved and subscribed by the defendant, Lynn J. Frazier, as Governor of North Dakota, and the same is now a valid legislative enactment and law of said state.

X.

Further answering, these defendants admit that the present fund in the Treasury of North Dakota, raised by general taxation for the purpose of defraying the expenses of the State government, amount to \$300,000, and that large sums are annually collected as taxes from all tax payers of the state and covered into the Treasury of the State and expended in paying the expenses of the state government; but deny that any of the defendants herein hold such funds in trust for the plaintiffs and other tax payers of the state, and deny that plaintiffs or any tax payers of the state have any beneficial interest
 77 in such fund; and allege that any of the defendants who has the custody and control of any of such funds holds the same as agents of, and for the use of the State of North Dakota, as a sovereign political entity.

XI.

Further answering, these defendants admit that the state of North Dakota has no moneys, funds or property, except such as has been collected by the taxation of the property of all the tax payers of the state, and moneys and property realized from schools and institutional lands granted to the state by the United States; and admit that said school and institutional lands and moneys realized therefrom cannot, under compact with the United States, be used for any purpose other than the maintenance and support of the schools and institutions of learning and other public institutions of the state; and allege that none of the defendants herein who has the custody or control of any such funds, intends to use such funds for any other purpose, or has threatened to use any of such funds for any other purpose than the maintenance and support of the schools and institutions of learning and other public institutions of the state.

XII.

Further answering, these defendants deny that any defendant herein, as an officer of the State of North Dakota, intends or has threatened to pay out, use, or expend any of the general funds of the state, or any funds of the state raised by taxation, or any funds of any city, village, township or school district of the state, in the purchase of any of the bonds mentioned in the Bill of Complaint herein, or in the purchase of any other bonds or securities, or to expend any of such funds for any unlawful purpose.

XIII.

Further answering, these defendants allege that Sec. 156 of Article 9 of the Constitution of North Dakota is as follows:

"The Superintendent of Public Instruction, Governor, Attorney General, Secretary of State, and State Auditor, shall constitute a

Board of Commissioners, which shall be denominated the 'Board of University and School Lands', and subject to the provisions of this Article and any law that may be passed by the Legislative Assembly, said board shall have control of the appraisement, sale and disposal of all school and university lands, and shall direct the investment of the funds arising therefrom in the hands of the State Treasurer, under the limitations of Sec. 160 of this Article."

78 That Sec. 162 of Article 9 of the Constitution of North Dakota, as amended by Article 5 of amendment of said Constitution, provides as follows:

"The moneys of permanent school fund and other educational funds shall be invested only in bonds of school corporations or of counties, or of townships, or of municipalities within the state, bonds issued for the construction of drains under authority of law within the state, bonds of the United States, bonds of the state of North Dakota, bonds of other states; provided, such states have never repudiated any of their indebtedness, or on first mortgages on farm lands in this state, not exceeding in amount one-third of the actual value of any subdivision on which the same may be loaned, such value to be determined by the Board of Appraisers of school lands."

XIV.

These defendants further answering deny that the defendants herein, constituting the Board of University and School Lands of North Dakota, have threatened or expressed any intention to invest in any of the bonds mentioned in the Bill of Complaint herein any of the permanent school funds or other educational funds which said Board of University and School Lands are authorized to invest; and allege that the defendants constituting the Board of University and School Lands of North Dakota will not, and do not intend to, invest any of said funds in the purchase of any bonds mentioned in the Bill of Complaint herein, unless and until such defendants shall be fully satisfied that such bonds are legal and valid bonds of the state of North Dakota, issued pursuant to law, and that the investment of such funds in said bonds would be a safe and profitable investment of such funds, and unless convinced that such defendants cannot more safely and profitably invest said funds.

XV.

Further answering, these defendants admit that prior to 1914, all constitutional amendments were initiated by the Legislature subject to the approval of the electors, and that such amendments were governed by Sec. 202 of the state constitution, and that the material part of said section of the state constitution is stated verbatim in section 12 of the bill of complaint herein; and admit that in 1914 said section 2 of said Constitution was amended by adding thereto

the words and language as alleged in section 12 of the bill of complaint herein.

XVI.

Further answering, these defendants admit that prior to the 20th day of January, 1919, Sec. 185 of the State Constitution was in force and was in the same language as alleged in paragraph 13 of the bill of complaint herein.

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XVII.

Further answering, these defendants allege that at the last general election held in the state of North Dakota on the 5th day of November, 1918, there was submitted to the voters thereof for their approval or rejection, a proposed amendment of Sec. 185 of the Constitution of said state, which proposed amendment reads as follows:

"Sec. 185, Article 12, as amended by Article 18 of the amendment. The State, any county or city may make internal improvements, and may engage in any industrial enterprise or business not prohibited by Article 20 of the Constitution (the manufacture and sale of intoxicating liquors), but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual association, or corporation, except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

That at said election said proposed amendment to Sec. 185 of the Constitution received a majority of all the legal votes cast at such election; and at the time appointed and provided by law, the State Board of Canvassers of the State of North Dakota ascertained and determined the result of said election upon said proposed amendment to the Constitution, and certified under their hands a statement of the whole number of votes given for and the whole number of votes given against such amendment, and determined that such amendment to the Constitution had been approved and ratified by a majority of the legal votes cast at such election, and made and subscribed on such statement a certificate that said amendment to the Constitution was duly carried and adopted, and the Secretary of State of said state recorded in his office such certified statement and determination of said state Board of Canvassers, and has caused such record to be bound in the volume containing the original enrolled laws passed at the last session of the Legislative Assembly next succeeding such determination of said Board of Canvassers.

XVIII.

Further answering, these defendants allege that at the Sixteenth Legislative Assembly of the State of North Dakota called and held in the city of Bismarck in said State, in accordance with the laws and constitution thereof, a concurrent resolution was passed and

adopted by the House of Representatives and the Senate of the State of North Dakota, in the manner provided by the Constitution and laws of said state, known as House Bill No. 12, in the words and language as follows:

90 "House Bill No. 12. A Bill. Concurrent Resolution. Agreeing to a proposed Amendment to the Constitution of the State of North Dakota by authorizing the state, any county or city, to make internal improvements, and to engage in any industry, enterprise or business not prohibited by Article 20 of the Constitution of the State of North Dakota; and declaring that said Amendment has become a part of the Constitution of the State.

"Be it resolved by the House of Representatives of the State of North Dakota, the Senate Concurring:

"That the following amendment to Section 185, Article 12, of the Constitution of the State of North Dakota, as amended by Article 18 of the amendments thereof, proposed by initiative petition by the people, which received a majority of all the votes cast at the general election held in this state on November 5, 1918, and referred to the Sixteenth Legislative Assembly of said state, is hereby agreed to, to wit:

"Section 185 in Article 12 as amended by Article 18 of Amendment. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by Article 20 of the Constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

"Be it further resolved, that the said Amendment is hereby declared to have become a part of the Constitution of the State."

That said House Bill No. 12 hereinbefore set out was on the 20th day of January, 1919, duly approved and signed by the Governor of the State of North Dakota, and said Amendment to Sec. 185 of the Constitution of the State of North Dakota is now a part of the Constitution of said state.

XIX.

Further answering, these defendants allege that at the last general election held in the state of North Dakota on the 5th day of November, 1918, there was submitted to the voters of said state in the manner provided by the law and constitution of said state, a proposed amendment to Sec. 182 of the Constitution of said state for the adoption or rejection by the electors of said state, which proposed amendment read as follows:

"Sec. 182 of Article 13. The state may issue or guarantee the payment of bonds, providing that all bonds in excess of Two Million Dollars shall be secured by first mortgages upon real estate in amounts not to exceed one-half of its value; or upon real estate or personal property of state-owned utilities, enterprises or industries, in amounts not exceeding its value, and provided further, that the state shall not issue or guarantee bonds upon property of state-owned utilities, enterprises or industries in excess of Ten Million Dollars. No future indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes, to be clearly defined. Every law authorizing a bond issue

81 shall provide, for levying an annual tax or make other provisions, sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax, or of such other provisions, to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war or to provide for the public defense in case of threatened hostilities."

That at said general election said proposed amendment to Sec. 182 of the Constitution of said state was approved by, and received a majority of all the legal votes cast at such election; and that said State Board of Canvassers at the time and in the manner provided by law determined and certified that said proposed amendment to Sec. 182 of the Constitution of said state had received a majority of all the legal votes cast at said election and was approved and adopted; and that a Concurrent Resolution, designated House Bill No. 9, was adopted in a manner provided by the Constitution and laws of North Dakota by the House of Representatives and the Senate of North Dakota, constituting the Sixteenth Legislative Assembly of said State, which Concurrent Resolution is, as follows:

"House Bill No. 9. A Bill. Concurrent Resolution. Agreeing to a proposed Amendment to the Constitution of the State of North Dakota by changing the debt limit thereof, and providing for issuing and guaranteeing bonds by the state, and providing that bonds issued or guaranteed by the state in excess of two million dollars shall be secured by first mortgages on certain classes of property; and declaring that said amendment has become a part of the Constitution of the State.

"Be it Resolved by the House of Representatives of the State of North Dakota, the Senate Concurring:

"That the following amendment to Section 182, Article 12, of the Constitution of the State of North Dakota, proposed by initiative petition by the people, which received a majority of all the legal votes cast at the general election held in this state on November 5, 1918, and referred to the Sixteenth Legislative Assembly of said state is hereby agreed to, to wit:

"Section 182, in Article 12. The state may issue or guarantee the payment of bonds, providing that all bonds in excess of two million dollars shall be secured by first mortgages upon real estate in amounts not to exceed one-half of its value; or upon real and personal property of state-owned utilities, enterprises or industries, in amounts not exceeding its value, and provided further, that the state shall not issue or guarantee bonds upon property of state-owned utilities, enterprises or industries in excess of ten million dollars.

"No future indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax, or make other provisions, sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax, or of such other provisions, to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war or to provide for the public defense in case of threatened hostilities.

"Be It Further Resolved, that the said Amendment is hereby declared to have become a part of the Constitution of the State."

And that on the 20th day of January, 1919, said Concurrent Resolution, known as House Bill No. 9, was approved and signed by the Governor of the State of North Dakota; and that the determination and certificate of said State Board of Canvassers that said proposed amendment to Sec. 182 of the Constitution of said state had been approved and adopted; and such proposed amendment to the Constitution has been by the Secretary of State of said State, bound in the volume containing the original enrolled laws passed at the Sixteenth Session of the Legislative Assembly of the State of North Dakota, being the session of said legislative assembly next succeeding said action of said State Board of Canvassers; and that said Sec. 182 of said Constitution has been duly and legally amended as herein set forth.

XX.

Further answering, these defendants allege that the question whether an Amendment to the Constitution of the state has been approved or adopted by the electors thereof, is not a judicial question, but is a political question; and that the political department, power and authority of the state of North Dakota has determined that Sec. 182 and Sec. 185 of the Constitution of said state has each been amended, as hereinbefore set forth, and that the amendments of said sections of the Constitution as hereinbefore set forth have been adopted and approved by the electors of said state.

XXI.

Further answering, these defendants admit, that the Sixteenth Legislative Assembly of the State of North Dakota duly and legally passed, in a manner prescribed by the Constitution of said state, the several legislative acts set out in full in paragraph 17 of the bill of complaint, and designated therein as follows:

- 83 House Bill No. 17, as "The Industrial Commission Act."
 House Bill No. 18, as "The Bank of North Dakota Act."
 House Bill No. 49, as "The Bank of North Dakota Bond Act."
 Senate Bill No. 130, as "The Bank of North Dakota, Real Estate Act."
 Senate Bill No. 20, as "The Mill & Elevator Ass'n Act."
 Senate Bill No. 75, as "The Mill & Elevator Ass'n Bond Act."
 Senate Bill No. 19, as "The Home Builders' Act."

XXII.

Further answering, these defendants admit that the defendants Lynn J. Frazier, William Langer, and John N. Hagen, officers of the State of North Dakota, claim the right and authority to act under the provisions of the constitutional amendments herein stated and the Industrial Commission Act set out in the bill of complaint herein, and have organized, and now claim to be a lawful organized body under the name of "The Industrial Commission of North Dakota"; and further admit that said Commission and the defendant designated by the Industrial Commission Act mentioned, intend to and will expend the money appropriated by said act, or so much thereof as may be necessary to comply with and carry into effect the provisions of said Act, designated in the bill of complaint, the Industrial Commission Act; and admit that said Industrial Commission and the members thereof have employed a Secretary of said Commission at a salary of \$3600 per annum, and intend to and will engage in and undertake all of the different enterprises and business projects especially provided for under the said acts of the Legislature set out in the bill of complaint herein, but deny that said Industrial Commission and the members thereof have commenced the organization of any of the special businesses mentioned in said Acts of the Legislature, except the organization of the Bank of North Dakota, as provided for in said "Bank of North Dakota Act"; and admit that said Industrial Commission has employed a manager for said Bank who is authorized to complete the organization and begin the operation thereof; and allege that the salary of said manager of said Bank is fixed at \$4,000 per annum, and not at \$5,000 per annum as stated in the bill of complaint herein; and admit that said Industrial Commission intends to commence and carry on the operation of said Bank, and will use and expend so much of the money appropriated by the Bank of North Dakota Act as is necessary to establish said Bank.

Admit that said Industrial Commission and the members thereof intend to proceed to carry out the provisions of the Bank of North Dakota Bond Act set out in the bill of complaint herein, and in so carrying out said provisions will expend so much of the 84 appropriations provided in said Act as is necessary to carry out the provisions thereof; and intend to carry out the provisions of the Bank of North Dakota Real Estate Bond Act as set out in the bill of complaint herein, and will expend so much of the money appropriated by said Act as is necessary to carry out the provisions of said Act; and intend to and will proceed to establish a system of warehouses, elevators, flour mills, factories, plants, etc., according to the provisions of the Mill & Elevator Association Act, as set out in the bill of complaint herein, and intend to and will proceed to acquire according to the provisions of said Act, by purchase, or by the virtue of the law of eminent domain, such property within the state of North Dakota, according to the terms of such Act, as may be necessary for carrying out the provisions of said Act; but deny that said Industrial Commission intends to establish any warehouses, elevators, flour mills, factories or other plants outside of the state of North Dakota, or to acquire any property for the purpose of carrying out the provisions of said Act, except in the manner provided by said Act; and admit that said Industrial Commission will expend so much of the money appropriated by said Act as is necessary in carrying out the provisions of said Act; and admit that said Industrial Commission and the members thereof intend to and will proceed to carry out the provisions of the North Dakota Mill & Elevator Association Bond Act, as the same is set forth in the bill of complaint herein, and intend to and will expend so much of the money appropriated by said Act as is necessary to carry into effect the provisions thereof; and intend to and will proceed to carry out the provisions of the Home Builders' Act, as the same is set out in the bill of complaint herein, and intend to and will expend so much of the money appropriated by said Act as is necessary to carry into effect the provisions of the legislative acts set forth in the bill of complaint herein will be taken from the funds of the state of North Dakota available therefor, according to said legislative acts; but do not know and are unable to ascertain at this time how much money it will be necessary to expend in carrying out the provisions of said Act.

XXIII.

Further answering, these defendants admit that the defendant, Obert Olson, as State Treasurer intends to and will prepare for issue, and the defendant Lynn J. Frazier, as Governor, with said Obert Olson as State Treasurer will execute and issue negotiable bonds of 85 the State of North Dakota in the aggregate amount of Two Million Dollars, pursuant to the said Bank of North Dakota Bond Act, and the defendant, Thomas Hall, Secretary of State, will attest the same and with the defendant Carl Kositzky, State Auditor, will certify to said bonds so executed, as provided in said Bank of North Dakota Bond Act, and that said bonds will be known and

designated as, "Bonds of North Dakota, Bank Series", and said bonds will be delivered to said Industrial Commission and by said Commission negotiated and sold, and that there will be thereby a liability against the state of North Dakota in the sum of Two Million Dollars; but deny that said liability can only be met and liquidated by moneys raised by taxation against the people and property in the state of North Dakota, and allege that said Bank of North Dakota Bank Act makes provision for the payment of said bonds and interest thereon from the profits and dividends of the Bank of North Dakota provided for in the legislative acts mentioned; and deny that said liability will in any way be in violation of the fundamental principles of a republican form of government, or any provision of the Constitution of the United States.

Admit that the defendants named in this paragraph intend to execute, issue, attest, and certify bonds of the state of North Dakota under the provisions of the Bank of North Dakota Real Estate Bond Act, hereinbefore mentioned; but allege that said bonds will be executed, issued, attested and certified only in the manner provided, and upon the terms and conditions mentioned in said Bank of North Dakota Real Estate Bond Act, and only when real estate mortgages to secure payment of said bonds have been deposited with the Treasurer of the State, as provided in said Act.

Admit that the defendants named in this paragraph intend to and will execute, issue, attest and certify bonds of the state of North Dakota under the provisions of said Mill and Elevator Association Bond Act; but allege that no such bonds will be executed, issued, attested or certified until the payment of the same has been secured by first mortgages upon the property of the North Dakota Mill and Elevator Association, as provided in said Acts herein referred to.

XXIV.

Further answering, these defendants say, that they do not know, and are not at this time able to ascertain the aggregate amount of bonds that will be executed and issued under the provisions of the

86 Bank of North Dakota Real Estate Bond Act, or under the provisions of the North Dakota Mill and Elevator Association Bond Act; but allege that no bonds will be issued or executed under either of said Acts, except in the amounts, and in the manner provided in said Acts, or until the payment of said bonds have been secured by mortgages as provided in said acts; and deny that any bonds issued pursuant to said Bank of North Dakota Real Estate Bond Act, or said Mill and Elevator Association Bond Act will constitute a liability which can only be met and liquidated by moneys raised by taxation against the people and property of the state of North Dakota, and allege that the payment of said bonds will be secured by mortgages upon tangible assets before any of such bonds are issued or executed.

XXV.

Further answering, these defendants allege that the state of North Dakota is by its Constitution and laws authorized to engage in business enterprises, and that any business enterprise in which the state of North Dakota so engages becomes a public purpose, and any net profits arising from the conduct of said business becomes the property of the state of North Dakota and can be used in the payment of the expenses of maintaining the state government, and to that extent diminish the burden of general taxation upon the people and property of the state; and deny that any business or enterprise which the Industrial Commission is authorized by the laws herein mentioned to carry on, is for the benefit of any person or persons other than the state of North Dakota.

XXVI.

Further answering, these defendants admit that the area, population, number of counties, railroad mileage, number of incorporated cities and villages and hamlets, number of railroad stations, sidings, and mercantile establishments, number of flour mills and the capacity thereof, number of licensed and private owned warehouses and elevators and the capacity thereof, the number of state and national banks and the capital stock and surplus of the same, number of loan and trust companies and loan agencies, the number of building and loan associations, number of acres of unbroken prairie used for grazing and stock raising are as alleged and set out in paragraph 22 of the bill of complaint herein.

XXVII.

Further answering, these defendants admit that the present occupation of the rural population of North Dakota is that of grain growing, dairying and stock raising; but deny that the large portion of the tax payers of the state, and the owners of a large part of the taxable property of the state are in no manner interested in any of the business enterprises or projects authorized and provided for by the legislative acts mentioned in the bill of complaint herein.

X-VIII.

Further answering, these defendants deny that if the state of North Dakota engages in the various enterprises and industries as provided in the legislative acts set out in the bill of complaint herein, the plaintiffs or any tax payer of said state will suffer any injury or damage, or be denied the equal protection of the law, or that they will be denied the protection of Sec. 4 of Article 4 of the Constitution of the United States, guaranteeing to each state and the citizens thereof a republican form of government; and allege that nothing contained in any of said legislative acts tends to change in any

manner the form of government of the state of North Dakota, or tends to prevent the election of officers of said state by vote of the people, or to deprive said state from maintaining legislative, executive and judicial departments, the officers of which are elected by the people.

XXIX.

Further answering, these defendants allege that for the state of North Dakota to engage in the business and enterprises as provided in the legislative acts mentioned in the bill of complaint herein, will be for the financial benefit of all the tax payers of the state of North Dakota, for the reason that the net profits and earnings of all said business and enterprises will belong to the state of North Dakota to be used in defraying the expenses of the government of said state, thus reducing the rate of general taxation; that the price received by the tax payers of the state of North Dakota for such raw material as will be used, such enterprises will be increased, and the price at which manufactured products produced by said enterprises will be sold to the citizens and tax payers of North Dakota will be reduced, and the rate of interest at which the citizens and tax payers of the state can borrow money will be reduced, and that every citizen and tax payer of the state of North Dakota will be financially benefited by the economic program provided for by said legislative acts.

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XXX.

Further answering, these defendants deny all and all manner of unlawful acts whatsoever whereof they are in any wise by the bill of complaint herein charged, all of which manner and things these defendants are ready and willing to prove as this honorable Court shall direct.

XXXI.

Further answering, these defendants pray in all things, the same benefit and advantage of this, their answer, as if they had pleaded and demurred to said bill of complaint.

Wherefore, And in consideration of which these defendants pray that the plaintiffs' prayer for a temporary restraining order to issue against these defendants be denied; that the bill of complaint of plaintiffs be dismissed; that these defendants be hence dismissed with reasonable cause and charges in this behalf most wrongfully sustained.

(Signed)

WILLIAM LANGER,
Attorney General for the State of North Dakota,
Solicitor for Defendants.

(Signed)

S. L. NICHOLS,
CHESTER A. MARR,
Attorney- for the Board of University and
School Lands,
Of Counsel.

Notice.

Filed April 15, 19-9.

(Title of Case.)

To John W. Scott and each of the other plaintiffs in the above entitled cause and to Messrs. N. C. Young, J. S. Watson, E. T. Conmy, Tracy R. Bangs, Philip R. Bangs, C. J. Murphy, and T. A. Toner, counsel for said plaintiffs:

Please take notice that the defendants, Lynn J. Frazier and John N. Hagen, individually; Lynn J. Frazier as Governor of the State of North Dakota; John N. Hagen as Commissioner of Agriculture and Labor of the State of North Dakota; and Lynn J. Frazier, William Langer and John N. Hagen, acting as the Industrial Commission of North Dakota, being certain of the defendants in the above entitled action, will, on the 25th day of April, 1919, or as soon thereafter as counsel can be heard, submit to the above entitled court at Fargo, North Dakota, the motion of said last mentioned defendants, pending in this cause, to dismiss this action, a copy of which is attached to this notice.

WILLIAM LEMKE,

Solicitor for said Moving Defendants.

Admissions of Service.

Copy of the within instrument received and service hereby admitted, this twelfth day of April, A. D. 1919.

J. S. WATSON,

WATSON, YOUNG & CONMY,

Plaintiffs' Attorneys.

Copy of the within instrument received and service hereby admitted this fourteenth day of April, A. D. 1919.

TRACY R. BANGS.

PHILIP R. BANGS.

C. J. MURPHY.

T. A. TONER.

Motion to Dismiss.

Filed April 25, 1919.

(Title of Case.)

Comes now the defendants and move the court to dismiss the bill of complaint of plaintiffs herein upon the points of law presented by the answer herein, and to dismiss this motion for the following reasons:

First. The court is without jurisdiction to hear and determine this action because:

(4) The bill of complaint shows on its face that it is in effect an action against the sovereign State of North Dakota and fails to show that the State of North Dakota has consented to be sued in this action.

(b) The bill of complaint fails to show that the matter in controversy, or cause of action, alleged therein arises under the laws or the Constitution of the United States.

(c) The bill of complaint fails to show that the interests of any one of the plaintiffs in the matter in controversy exceeds in value the sum of three thousand dollars (\$3,000.00) and shows that the plaintiffs form a class of parties who have relation to the common fund sought to be administered.

Second. That there is a non-joinder of parties defendant to this action, for the reason that the bill of complaint on its face shows that the State of North Dakota is the real party defendant, and the State of North Dakota is not made a party defendant to the action and said State cannot be made a party defendant.

Third. That the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

WILLIAM LANGER, ·

Attorney General of the State of North Dakota.

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Amended Motion to Dismiss.

Filed May 2, 1919.

(Title of Case.)

Now come Lynn J. Frazier and John N. Hagen, individually; Lynn J. Frazier as Governor of the State of North Dakota; John N. Hagen as Commissioner of Agriculture and Labor of the State of North Dakota; and Lynn J. Frazier, William Langer and John N. Hagen, acting as the Industrial Commission of North Dakota, being certain of the defendants in the above entitled action and move the court to dismiss this action and that they take their costs in this suit incurred for the following reasons:

1. Because it appears in the complaint filed in this cause that there is insufficiency of fact to constitute a valid cause of action in equity against these defendants or any of them and that said complaint fails to allege facts constituting such cause of action.

2. Because it appears in the complaint filed in this cause that this Honorable Court has no jurisdiction of the subject matter of the pretended cause of action set forth in said complaint.

The said action is made upon the bill of complaint and all the cases and proceedings herein and upon all matters of which said court will take notice, including among others certain matters of record, to-wit:—

1. In 1893 the legislature of North Dakota passed a bill providing for the purchase of a site and for the erection of a state elevator at Duluth, Minnesota, Superior, or West Superior, Wisconsin, for public storage and the shipment of wheat, and the regulation thereof, and appropriated \$100,000 for this purpose. This bill was approved by the Governor on March 17, 1893. Session Laws of North Dakota 1893, p. 165.
2. In 1909 the legislature of North Dakota passed a concurrent resolution proposing an amendment to the Constitution of the State of North Dakota, empowering the legislative assembly to provide by law for the erection, leasing purchasing and operating of terminal elevators in the states of Minnesota and Wisconsin, or either. Session Laws of North Dakota 1909, p. 344.
3. In 1911 the legislative assembly again passed the above resolution proposing a constitutional amendment authorizing the legislative assembly to provide by law for the erection, leasing, purchasing and operating of terminal elevators in the states of Minnesota and Wisconsin, or either. Session Laws of North Dakota 1911, p. 161.
4. This proposed amendment to the constitution was then submitted by the Secretary of State for approval or rejection to the electors of the state at the general election of 1912, and was adopted by an overwhelming majority.
5. In 1911 the legislature of North Dakota passed another concurrent resolution proposing a constitutional amendment, empowering the legislative assembly to provide by law for the erection, leasing, purchasing and operating of terminal elevators in the state of North Dakota. Session laws of North Dakota 1911, p. 165.
6. The resolution last above mentioned was again passed by the legislative assembly in 1913. Session Laws of North Dakota 1913 p. 132.
7. In 1913 the concurrent resolution proposing amendment to the Constitution last above referred to was again passed by the legislative assembly. Session Laws of North Dakota 1913, p. 132.
8. Thereupon the Secretary of State caused the same to be submitted to the electors for their approval or rejection at the general election of 1914 and it was adopted by a vote of 51,507 for and 18,483 against.
9. In 1913 the legislature of North Dakota passed an act to provide funds for the erection, purchase, lease or establishment of a terminal elevator system in the state of Wisconsin or in the state of Minnesota or in both said states and for the maintenance and oper-

ation of the same and for the establishment of additional duties of the Board of Control of state institutions in relation thereto, 93 and levied a tax of one-eighth of a mill upon all taxable property of the state to provide such fund. Session Laws of North Dakota 1913, p. 435.

10. In 1913 the legislature of North Dakota passed an act amending the act last above mentioned and levying a tax upon all taxable property within the state, real and personal, for the year- 1915 and 1916 and during each of said years the sum of \$1,000 to be used for the erection, purchase, equipment, maintenance and operation and an investigation of the practicability of terminal elevators in the states of Minnesota, North Dakota or Wisconsin. Session Laws of North Dakota 1915, p. 380.

11. In 1917 the legislature again passed an act to provide for the creation of a commission, the selection of a location, erection, leasing, operating and renting or selling of one or more terminal elevators either within or without the state of North Dakota and making an appropriation therefor. This, the Governor vetoed, as a subterfuge and as not complying with the platform for state-owned elevators and flour mills, upon which he was elected, as stated in his veto. Session Laws of North Dakota 1917, p. 302.

12. In 1916 and in 1918 the republican platform upon which the present state administration was elected, both times by an overwhelming majority, advocated unequivocally rural credit banks state-owned terminal elevators and flour mills, packing plants, etc.

13. In the spring of 1917 a petition containing the names of over 47,000 electors of the state was filed with the Secretary of State, initiating an amendment to the constitution, authorizing "the state, any county or city to make internal improvements and to engage in any industry, enterprise or business not prohibited by Article 20 of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or co-poration except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

94 This amendment was submitted by the Secretary of State to the electors and was approved by an overwhelming majority.

14. During the primary and general elections of 1916 and 1918 the principal issues in the campaigns were the building and operation by the state of terminal elevators, flour mills, packing plants and other public utilities, state hail insurance and rural credit banks.

15. In 1915 the legislature of North Dakota passed a concurrent resolution proposing amendment to the constitution, providing for the levy of a tax on such lands of the state as may be provided by law to create a fund to insure the owners of growing crops against loss by hail. Session Laws of North Dakota 1915, p. 113.

16. In 1915 the legislature passed a concurrent resolution proposing amendment to the constitution, relating to loans, giving credit or aid by the state or political subdivisions, or to the agricultural loans, properly known as rural credits.

17. In 1917 the legislature again passed a concurrent resolution, relating to state hail insurance and providing for the levying of a tax upon land. Session Laws of North Dakota, p. 101.

18. In 1911 the legislature passed an act establishing a state hail insurance department, which has been successfully operated by the state up to date. Session Laws of North Dakota 1911, p. 26.

19. In 1913 the legislature re-enacted and amended the hail insurance act, which act has been further amended by the legislature of 1919.

WM. LEMKE,
Fargo, North Dakota,
Solicitor for Said Defendants.

FREDERIC A. PIKE,
St. Paul, Minnesota,
Of Counsel.

95 *Stipulation for the Dismissal of the Board of University and School Lands.*

Filed June 12th, 1919.

(Title of Case.)

Come now the plaintiffs, in the above entitled action, and move to dismiss, and do now dismiss, the above entitled action as to the Board of University and School Lands, and as to the members of such Board, to-wit: Lynn J. Frazier, William Langer, Thomas Hall, Carl Kozitsky and Minnie J. Nielson in their capacity as members of said Board, and without prejudice to the continuation of this action against the said Lynn J. Frazier, William Langer, Thomas Hall and Carl Kozitsky in the character in which they are otherwise named in the bill of complaint, and without prejudice to the plaintiffs' demand for relief in this action, excluding only relief asked against the Board of University and School Lands and the members.

Dated this 22nd day of May, 1919.

J. S. WATSON,
N. C. YOUNG,
E. T. CONMY,
TRACY R. BANGS,
PHILIP R. BANGS,
C. J. MURPHY AND
T. A. TONER,
Solicitors for Plaintiffs.

Acceptance of Service.

Service of the above Motion to Dismiss as to the Board of University and School Lands, and the members thereof, is accepted this 23rd day of May, 1919, and consent is given to the entry of an order dismissing the action as to the Board of University and School Lands, and the members thereof, in this action.

WILLIAM LANGER,
*Attorney General, and Attorney for
Board of University and School Lands,
and the Members Thereof.*

96 *Order Dismissing as to Board of University and School Lands.*

Entered June 12th, 1919.

(Title of Case.)

Upon a stipulation this day filed herein it is ordered that this case be dismissed as against the Board of University and School Lands, and as to the members of such Board, to-wit: Lynn J. Frazier, William Langer, Thomas Hall, Carl Kozitsky and Minnie J. Nielson, in their capacity as members of said board, and without prejudice to the continuation of this action against the said Lynn J. Frazier, William Langer, Thomas Hall and Carl Kozitsky in the character in which they are otherwise named in the bill of complaint, and without prejudice to the complainants' demand for relief in this action, excluding only relief asked against the Board of University and School Lands and the members thereof.

Opinion of the Court.

Filed June 14th, 1919.

(Title of Case).

97 N. C. Young, Esq., J. S. Watson, Esq., E. T. Conmy, Esq., of Fargo, North Dakota, and Tracy R. Bangs, Esq., Phillip R. Bangs, Esq., C. J. Murphy, Esq., T. A. Toner, Esq., of Grand Forks, North Dakota, Solicitors for Plaintiffs. Wm. Lemke, Esq., of Fargo, North Dakota, and Frederick A. Pike, of St. Paul, Minnesota, Solicitors for the Industrial Commission of the State of North Dakota. Hon. William Langer, Attorney General, of Bismarck, North Dakota; Hon. S. L. Nichols, of Mandan, North Dakota, and Hon. W. S. Lauder, of Wahpeton, North Dakota, Solicitors for the other Defendants.

This is a suit in equity to restrain the defendants, (a) from paying out public funds in the state treasury amounting to several hundred thousand dollars; (b) from issuing bonds of the state for

much larger amount; and (c) to have two amendments of the state constitution and the statutes authorizing the above payments and bonds declared null and void. It is charged in the bill that the payments are to be made, and the bonds issued, for private, as distinguished from public purposes; that they will result in creating debts which can only be paid by taxes upon the property of the citizens of the state.

The plaintiffs are forty-two taxpayers, and bring this suit on behalf of themselves and all other taxpayers. They are all citizens and residents of the state of North Dakota. This is also true of the defendants, so jurisdiction cannot be rested on diversity of citizenship.

The jurisdiction of this court is based upon two facts. First, that the amount in controversy exceeds the sum or value of \$3,000; and second, that the suit arises under the Fourteenth amendment of the Federal Constitution. A case showing both these features must be made out by the bill; otherwise the court is without jurisdiction, and the motion of defendants to dismiss should be granted.

Plaintiffs rest their claim of the first element of jurisdiction namely, that the amount in controversy exceeds the sum or value of \$3,000., upon two grounds:

1. They assert that the suit is brought on behalf of the state to protect it against the unconstitutional use of its funds and an unconstitutional issue of bonds. That being the nature of the suit, it is claimed that the entire fund is the amount in controversy and not the right or possible damage of the plaintiffs. This theory presupposes that the state has rights that are protected by the Fourteenth Amendment. If it has no such right, plaintiffs have no standing in this court as its representatives and must stand on their own feet. Has the state then any rights under the Fourteenth amendment. That question must be answered in the negative. The amendment protects only the rights of "persons." This term has been enlarged by judicial interpretation so as to cover private corporations. It does not embrace public corporations, much less the state. Its language is: "Nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws." It would be a perversion of language to say this language protects the state against acts of the state. It protects persons only, a term which embraces private corporations but not public corporations or states. It follows, therefore, that plaintiffs, while they assert rights under the Fourteenth Amendment, cannot assert rights of the state because it has no rights that are protected by that amendment. It necessarily results that plaintiffs in this suit represent only themselves.

2. Plaintiffs assert that in suits to restrain an unconstitutional use of public funds, or issue of bonds, or levy of tax, the amount of the funds or of the bonds or of the tax is the measure of the "amount" in controversy and not the injury to plaintiffs. There

is some language in the cases which supports that view. It is, however, at variance with the decision of the Supreme Court in *Colvin vs. Jacksonville* 158 U. S., 456, and with the uniform practice in Federal Courts since that decision has become known to the profession. That was a taxpayers' suit. It was brought to restrain a threatened issue of bonds for one million dollars. It was proven that the amount of taxes which would be levied on plaintiff's property in case the bonds were issued would be less than \$2,000, the amount then necessary to confer jurisdiction, and the trial court dismissed the bill for want of jurisdiction. Plaintiff insisted that the amount of the bond issue, and not his tax liability, was "the amount in controversy," and at his instance the court certified the question of jurisdiction to the Supreme Court. Anyone who will read the certificate as set forth at page 458 of the report, will see that the exact question involved under this heading of the present case was there presented to the Supreme Court. In deciding it, the court says, at page 460: "This leaves the only question to be considered whether the amount of the interest of complainant, and

not the entire issue of bonds, was the amount in controversy, 100 and, in respect of that, we have no doubt the ruling of the Circuit Court was correct." The court then examines *Brown vs. Truesdale*, 138 U. S., 389, which was cited to me by counsel for the plaintiffs, and then orders decree affirming the decision of the lower court. It is plain, therefore, that the court there regarded *Brown vs. Truesdale* as in harmony with the decision which it was rendering, or that its language ought to be qualified so as to bring it into harmony.

The case of *Colvin vs. Jacksonville*, supra, is not referred to by the Circuit Court of Appeals of this circuit in its opinion in *City of Ottumwa vs. City Water Supply Company*, 119 Fed. 315.

Plaintiff's interest in the *Ottumwa* case was sufficient to confer jurisdiction, so the language in the second paragraph of the opinion on page 318 was obiter, and, as it is in direct conflict with the decision in the *Colvin* case, must be treated as an erroneous statement of the law.

Colvin vs. Jacksonville has never been qualified or criticised by the Supreme Court or any circuit court of appeals. From the date of that decision to the present time it has been the uniform practice in taxpayers' suits to restrain an issue of bonds, or a levy of taxes, to show that plaintiffs' threatened damage was sufficient to confer jurisdiction. The latest decision on the subject is *Greene vs. Louisville & Interurban Railroad Co.*, 244 U. S., 499-508. See also *Orleans-Kenner Electric R'y Co. vs. Dunbar* 218 Fed. 344; *Cowell vs. City Water Supply Co.*, 121 Fed. 53, and *Resley vs. Utica*, 168 Fed. 737.

In suits to enjoin a threatened tax levy, and that is the nature of the suit here, in all its aspects, the authorities are uniform that the individual plaintiffs must each have an interest to the 101 amount of \$3,000., and that several plaintiffs cannot aggregate their interests for the purpose of making up the \$3,000. *Wheelees vs. City of St. Louis*, 96 Fed. 865; same case, 180 U. S. 399; *Rogers vs. Hennepin Co.*, 239 U. S. 621.

How then are the numerous cases referred to in Dillon on Municipal Corporations, 5th Edition, Section 1579, et seq., and cited to the court in argument, to be explained? That is not difficult. None of them asserts rights under the Fourteenth Amendment. They all involve cases in which cities were attempting to levy taxes or issue bonds in violation of state laws or state constitutions. With the exceptions presently to be mentioned, the cases all arose in state courts. There it is not necessary for a plaintiff to show any particular amount as the basis of jurisdiction. Taxpayers may sue in the state courts, and claim the protection of the Fourteenth Amendment without showing that they have a personal interest amounting to \$3,000. The only object of the averment that they are taxpayers is simply to show that they are not intermeddlers. If the state courts deny to taxpayers thus asserting rights under the Fourteenth Amendment, a writ of error to the Supreme Court of the United States will lie to review the decision. This distinction must be kept constantly in mind in examining decisions of the Supreme Court: Was the case brought before that court by writ of error from the highest court of the state, or by writ of error or appeal to review the decisions of a Federal, Circuit, or District Court. In one case the amount involved is immaterial, and in the other it is controlling.

It remains to notice two cases which are relied on by plaintiffs. The first is *Crompton vs. Zabriski*, 101 U. S., 601. That involved an issue of bonds by the county of Hudson in the State of New Jersey for several hundred thousand dollars.

102 The bonds were illegal because no provision for their payment by tax levy was made as the law required. On certiorari to the board issuing the bonds, a judgment was entered by the Supreme Court of the state, declaring them void. Notwithstanding this judgment, the bonds were issued to the plaintiff, Crompton. He then brought an action at law to collect the bonds in the Federal Court. Jurisdiction of this action was based upon diversity of citizenship and the complaint showed the requisite jurisdictional averment. Zabriski and two other resident taxpayers of the county then filed a bill of complaint on the equity side of the Federal Court, praying that the bonds be declared void, and be delivered up, and that the board be ordered to reconvey the property to Crompton, and that he be enjoined from prosecuting the action at law or parting with the bonds in any other way than by surrendering them to the board. This bill, was, of course, ancillary, and jurisdiction of the Federal Court to entertain it rested upon its jurisdiction over the action brought by Crompton. Such being the nature of the suit, two facts are clear: First, that the taxpayers' rights were based on a violation of state law, and not on the Fourteenth Amendment. Second: That jurisdiction of the court was based on the original action brought by Crompton, and the complaint in that clearly showed a right in the plaintiff sufficient to confer jurisdiction. What the court says in the passage quoted by counsel about the right of taxpayers to maintain a suit in equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt, is addressed to the question whether taxpayers have a right to maintain

such a suit to protect their own interests, and has nothing to do with the question for which the quotation was cited in argument here, namely, the right of taxpayers to assert rights of the state, or of a city. Mr. Justice Field in the language used, is answering the contention that a taxpayer under no circumstances can maintain such a suit. Such is the holding of the courts of New York and several other state courts. Dillon on Municipal Corporations, 5th Edition, Section 1585.

The other cases cited by plaintiffs here is *Daveport vs. Buffington*, 97 Fed., 234. That came before the Circuit Court of Appeals of this Circuit on appeal from the Supreme Court of the Indian Territory. It involved therefore no question of jurisdiction of the trial court, as a Federal Court, depending upon a showing that the plaintiff had a right of the value of \$3,000. The suit was brought by taxpayers to prevent the use of property which had been given to the city for a park for other purposes. The taxpayers filed their bill to enforce this trust. No right is asserted under the Fourteenth Amendment. The passage quoted simply goes to the general question of the right of taxpayers to maintain suits in equity to prevent a misuse of property or funds belonging to a city.

It may be doubted whether taxpayers may maintain a suit against state officers to vindicate alleged rights of a state. I have been unable to find any authority that would support such a doctrine. Such suits have been confined to actions against municipal officers to vindicate the rights of cities. Such are all the cases cited by Judge Dillon in his work on Municipal Corporations, Section 1579. The reasons which permit such suits in the case of municipal corporations has no application to states. Municipal corporations exist under special charters and have only such powers of taxation as are specifically conferred upon them. They have many of the qualities of a private corporation and the right to maintain taxpayers' suits has been rested upon the same ground as the right of stockholders to maintain similar suits in behalf of a private corporation. States are not municipal corporations. Their powers are not defined by charter. They possess all powers except as they are limited by the state and federal constitutions. This is especially true of their power to tax. The power to maintain taxpayers' suits even against municipal officers has been denied by the courts of New York, Massachusetts and several other states. Dillon, Sec. 1585, et seq. I can find no justification for extending the doctrines to actions against state officers.

From this examination, the conclusion necessarily follows that plaintiffs must show a personal interest amounting to \$3,000. in order to give this court jurisdiction, and as no such showing is made in the present bill, the jurisdiction of the court as a federal court fails.

The other jurisdictional element presents the question whether the bill shows a case arising under the Fourteenth Amendment. That depends on whether the purpose for which the laws here assailed seek to use the taxing power is private or public. When a state enters a new field of taxation, as North Dakota has

in these laws, that question is always raised. It was urged against laws to establish public schools, and publicly owned water, gas and electric plants, with the same vehemence as it is now urged against the present laws. The line of legislative power has been steadily advanced as society has come to believe increasingly that its welfare can best be promoted by public as distinguished from private ownership of certain business enterprises. Laws which at one time were held invalid have at a later period been sustained by the same court. No judge can investigate judicial decisions rendered during the past ten years without being impressed with the rapid extension of state activity into fields that were formerly private. The twilight zone that separates here permissible from forbidden state action is broad. Business which will seem to one court to be public will seem to another to be private. The decisions on the subject are cited and analyzed by the Supreme Court of Louisiana in the recent case of Union Ice and Coal Co. — Rustan 135 La. 898; L. R. A. 1915, 859; 66 So. 262. See also Yale Law Journal 824-236 for a scholarly examination of the subject.

McQuillan on Municipal Corporations, Section 1809 and the 5th Edition of Dillon on Municipal Corporation, Volume 3, Section 1292, which contain the last word of text writers on the subject, solemnly inform us that cities cannot be authorized to establish publicly owned coal and wood yards because that would be using the taxing power for a private purpose. The next edition of these works will strike out this language and inform us that such yards are permissible because they are for a public purpose and are publicly owned, citing Jones vs. Portland, 245 U. S. 217. Thus "can" succeeds "can't" in this field of law so rapidly that one can hardly tell which word he is looking at.

What may be done by the state to protect its people and promote their welfare, cannot be declared by a priori reasoning. New evils arise as a result of changing conditions. If the state remains static while the evils that afflict society are changing, and dynamic, the state soon becomes wholly inadequate to protect the public. The state must be as free to change its remedies as the evils that cause human suffering are to change their forms. Merrick vs. Halsey Co. 242 U. S. 568-588.

There are a few great landmarks by which to determine whether laws authorizing taxation are for a public or a private purpose. We shall find our way best by first looking at them.

1. The power of taxation is legislative. The right of the people to determine the amount and purpose for which taxes may be levied has for centuries in this country and in England been regarded as the peculiar prerogative of the representatives of the people in their legislative bodies. As Marshall said in McCulloch vs. Maryland, 4 Wheaton, 316, 428; "The only security against the abuse of the power of taxation is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exi-

agencies of the government cannot be limited, they prescribe no limits to the exercise of the right, resting confidently on the interests of the legislature, and on the influence of the constituents over their representatives to guard them against its abuse." This language has been qualified by later decisions of the Supreme Court holding that a tax must be for a public purpose or it is a deprivation of property without due process of law and that the final decision of whether a tax is for a public purpose is for the courts and not the legislature. It is nevertheless true that the presumption that a law is constitutional is applied with unusual force in favor of laws passed in the exercise of the power of taxation. The power of taxation lies in a field of even broader legislative discretion than the "police power" under which constitutional questions have been more frequently raised.

2. This presumption in favor of laws imposing taxes is, as Judge Cooley says, in his work on taxation, (3rd Edition, page 185) "applicable with peculiar force to the case of a legislative decision upon the purpose for which a tax may be laid. For in the first place there is no such thing as drawing a clear and definite line of distinction between purposes of a public and those of a private nature. Public and private interests are so commingled in many cases that it is difficult to determine which predominates; and the question whether the public interest is so distinct and clear as to justify taxation is found embarrassing to the legislature, and no less so to the judiciary. * * * To justify the court in declaring the tax void, the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable, so clear and palpable as to be perceivable by every mind at first blush."

3. "Limitations or restrictions upon the exercise of this essential power of sovereignty can never be raised by implication, but the intention to impose them must be expressed in clear and unambiguous language." Cooley on Taxation, page 177. What constitutes a public purpose will vary in different communities and different periods. *Fallbrook Irrigation District vs. Bradley*, 164 U. S. 112; *Clark vs. Nash*, 198 U. S. 362; *Oneil vs. Leamer*, 239 U. S. 244, 253; *Noble State Bank vs. Haskell*, 219 U. S. 10.

4. The Fourteenth Amendment contains no express language limiting the taxing power of states. Laws have been condemned by holding that a tax for a purely private purpose deprives the taxpayer of his property without due process of law. When is a tax for a "purely private purpose" within this rule?

a. The only cases in the Federal courts in which laws have been condemned are those in which bonds or public funds were given as a mere gratuity to a privately owned manufacturing enterprise to encourage its establishment within the city. Such are the cases cited by counsel for plaintiff, *Loan Association vs. Topeka* 20 Wall. 655; *City of Parkersburg vs. Brown* 106 U. S. 487; *Cole vs. City of La Grange* 103 U. S. 1; *Dodge vs. Mission Township*, 107 Federal 827.

b. I have not been able to discover any instance in which the Supreme Court has held invalid an exercise of the taxing power of the state for establishing and maintaining an industry which was owned by the state or a municipality. Such is the character of all the laws here assailed. The industries are to be owned by the state and the cities. The latest expression of the Supreme Court on the subject is *Jones vs. City of Portland*, 245 U. S. 217, sustaining a statute of the state of Maine authorizing cities to establish and maintain wood, coal and fuel yards for the purpose of selling at cost wood, coal and fuel to their inhabitants. This decision is the more impressive because a similar law had been held invalid by the Supreme Court of Massachusetts and by some other state courts.

c. The leading authority in this country declaring a statute unconstitutional because it authorized taxation for private purposes is *Lowell vs. the City of Boston*. That case involved an issue of bonds to aid in the rebuilding of the portion of Boston that was destroyed in the great fire of November, 1872. The statute authorized the city to issue its bonds for twenty million dollars and out of the fund arising from their sale make loans to parties upon mortgages to aid in restoring the part of the city that had been destroyed. John A. Lowell and nine other taxable inhabitants brought suit to restrain the issuance of the bonds on the ground that the statute was unconstitutional. The Constitution of Massachusetts, like the Fourteenth Amendment of the Federal Constitution protects every individual "in the enjoyment of his life, liberty and property according to law." The statute was held to violate this provision. The court decides that however much the public welfare may be promoted by the use of the taxing power, if the direct benefits are to the individuals receiving the money and the public benefits are only indirect, the use of the taxing power is invalid. It is a striking illustration of the inconsistency of judicial reasoning that at this very time the courts all over the country were sustaining laws authorizing railroad aid bonds amounting to many millions which were given to the private owners of railroads, and the bonds were justified by the courts solely upon the ground that the public received an indirect benefit from the building of the railroads.

Returning now to *Lowell versus Boston*. It was decided in 1873 and has been a precedent for many decisions in Massachusetts and in other states condemning uses of the taxing power which were deemed to be for the public welfare. In 1917 the state held a constitutional convention. Its first action was to adopt an amendment sweeping away this decision. In a convention characterized by the conservatism of Massachusetts, the amendment was carried by a vote of 275 to 25 and was adopted by a popular vote of 261,138 to 52,437. This was the first time that the reasoning of *Lowell vs. Boston* was brought to the judgment bar of the people of the state. That decision had stood for more than half a century as an authority supporting scores of decisions nullifying laws to correct evils from which men, women and children were

suffering and furnishing reasons to even more congresses, legislatures and city councils why other laws should not be passed to correct such evils. And now that the real supreme tribunal of Massachusetts, the people of that commonwealth, has swept all these judicial precedents away in that state, what do we say has happened? This "The court was right all the time; but the people have now amended their constitution and granted the legislature power to do what the court said they couldn't do before and so the legislature may hereafter enact needed laws." But does that state the whole truth? I think not. It is not more true to say that the people of Massachusetts have corrected, if not rebuked, the judges of their Supreme judicial court. Have they not really said to their judges "You have been wrong all this half century. We never intended those general words in the Constitution to mean what you have been saying they mean and we wish you wouldn't use them any more to protect practices that have been proven to be economically, morally and legally unsound (*Ives vs. South Buffalo Railway Company* 201 N. Y. 271-287) and nullify laws passed for their correction." Is not that the real interpretation of what has happened, not only in Massachusetts, but in the adoption in nearly every state in the union during the last fifteen years, of constitutional amendments to correct decisions made under the general provisions which forbids a deprivation of life, liberty and property without due process of law.

111 *d.* No court has been so insistent and emphatic as the Supreme Court of the United States against the abuse of the power to declare laws unconstitutional under the general language of the Fourteenth Amendment.

1. It has restated the scope of the police power. Prior to 1885 that power was restricted by American courts to the public safety, health and morals. The Supreme Court holds that it embraces also laws intended to promote public prosperity and general welfare. *C. B. & Q. R'y Co. vs. Drainage Board*, 200 U. S. 561-592; *Chicago & Alton Railway Co. vs. Tranbarger*, 238 U. S. 67-77.

2. The courts may not concern themselves with the policy of legislation or its economic wisdom or folly. Those are considerations belonging exclusively to the legislature. *C. B. & Q. R'y Co. vs. McGuire*, 219 U. S. 549-569; *Price vs. Illinois*, 238 U. S. 446, 451-452; *Rast vs. Van Deman & Lewis*, 240 U. S. 342, 357; *Merrick vs. Halsey*, 242 U. S. 568, 586-588.

3. A law cannot be set aside "because the judiciary may be of the opinion that the act will fail of its purpose or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

McLean vs. City of Arkansas, 211 U. S. 538, 547-48; *Tanner vs. Little* 240 U. S. 369-385.

In the light of these established doctrines let us look at some of the general facts that condition this case.

The people of North Dakota are farmers, many of them pioneers. Their life has been intensely individual. They have never been

combined in corporate or other business organizations to train them in their common interests or promote their general welfare. In the main they have made their purchases and sold their products as individuals. Nearly all their livestock and grain is shipped to terminal markets at St. Paul, Minneapolis and Duluth.

There these products pass into the hands of large commission houses, elevator and milling companies and livestock concerns. These interests are combined not only in corporations, chambers of commerce, boards of trade and interlocking directorates but in the millions of understandings which arise among men having common interests and living through long terms of years in the daily intercourse of great cities. These common understandings need not be embodied in articles of incorporation or trust agreements. They may be as intangible as the ancient "powers of the air". But they are as potent in the economic world as those ancient powers were thought to be in the affairs of men. It is the potency of this unity of life of men dwelling together in daily intercourse that has caused all nations thus far to be governed by cities.

As North Dakota has become more thickly settled and the means of intercourse have increased the evils of the existing marketing system have been better understood. No single factor has contributed as much to that result as the scientific investigations of the state's Agricultural College and the federal experts connected with that institution. That work has been going on for a generation and has been carried to the homes of the state by extension workers, the press and the political discussion of repeated political campaigns. The people have thus come to believe that the evils of the existing system consist not merely in the grading of grain, its weighing, its dockage, the price paid and the disparity between the price of different grades and the flour producing capacity of the grain. They believe that the evil goes deeper; that the whole system of shipping the raw materials of North Dakota to these foreign terminals is wasteful and hostile to the best interests of the state. They say in substance:

1. The raw materials of the state ought to be manufactured into commercial products within the state. In no other way can its industrial life be sufficiently diversified to attain a healthy economic development.

2. The present system prevents diversified farming. The only way that can be built up is to grind the grain in the state which the state produces — keep the by-products of bran and shorts here and feed them to livestock upon the farms of the state. In no other way can a prosperous livestock, dairy and poultry industry be built up.

3. The existing marketing system tends directly to the exhaustion of soil fertility. In no way can soil depletion be prevented except to feed out to livestock at least as much of the by-products of the grain raised upon the state's farms as that grain produces when ground and thus put back into the soil in the form of enriched manures, the elements which the raising of small grains takes from it.

The present movement began at least as far back as 1911. In

that year an amendment of the State Constitution was initiated authorizing the state to acquire one or more terminal grain elevators and maintain and operate the same in such manner as the legislative assembly should prescribe. That amendment was adopted in 1913. From that time forward the discussion of the subject of marketing the products of the state has been the main theme of public thought. The movement has gone straight forward, the constitution has been repeatedly amended including the amendments here assailed—all having for their object the correction of the existing system of marketing the state's products. Year by year the conviction has deepened, in steadily increasing majorities, that public ownership of terminal elevators, mills and packing houses is the only effective remedy to correct the evils from which they believe themselves to be suffering.

114 Their decision is not a popular whim but a deliberate conviction arrived at as a result of full discussion and repeated presentations of the subject at the polls. The acts which the court is asked to restrain are not those of public officials, who are pursuing enterprises of their own devising. Those acts express not simply the judgment of the state legislature. To authorize their enactment the people of the state have re-drawn their Constitution. That is the highest and most deliberate act of a free people. These constitutional amendments authorize and direct the state to do what the defendants are threatening to do. Their acts are simply the carrying out of the mandate of those constitutional amendments.

It is hopeless to expect a population consisting of farmers scattered over a vast territory as the people of this state are to create any private business system that will change the system now existing. The only means through which the people of the state have had any experience in joint action is their state government. If they may not use that as the common agency through which to combine their capital and carry on such basic industries as elevators, mills and packing houses and so fit their products for market and market the same they must continue to deal as individuals with the vast combinations of these terminal cities and suffer the injustices that always exist where economic units so different in power have to deal the one with the other.

The foregoing is what a majority of the people of the state have been persuaded to believe by those whose leadership they trust. Whether their grievances are real or fancied, whether their remedies are wise or foolish, are subjects about which the court is not concerned. The only object in trying to set them forth has been to place the constitutional amendments and laws here assailed in their true relationship to the life and thought of the people by whom they were adopted.

115 The sole question then for the court is: Do these acts of the state constitute a violation of the Fourteenth Amendment of the Federal Constitution as that amendment has been construed by the Supreme Court? I think it is clear that they do not. Even if were in doubt it would be my duty to sustain the action of the state for it is only when legislation is plainly and palpably unconstitutional that a court is justified in nullifying it.

The motion of the defendants will, therefore, be granted and a decree entered dismissing the bill with costs.

Dated June 14th, 1919.

CHARLES F. AMIDON,
Judge.

16

Decree.

Entered June 14th, 1919.

(Title of Case.)

This cause having come on for hearing before the Court, upon the motion of the defendants to dismiss the bill, after hearing arguments of counsel, and due consideration, it is

Ordered, Adjudged and Decreed that said motion be granted and that the bill of complaint herein be and the same hereby is dismissed; and it is further

Ordered, Adjudged and Decreed that the defendants have and recover of the plaintiffs herein their costs and disbursements, taxed and allowed at the sum of \$20.00 and have execution therefor.

Petition for Appeal.

Filed July 14, 1919.

(Title of Case.)

To the Honorable Charles F. Amidon, Judge of the Above Named Court:

The above named plaintiffs and appellants, conceiving themselves aggrieved by the decree made and entered on the 14th day of June, 1919, in the above entitled cause, which decree dismisses the plaintiffs' bill, with costs, do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and they pray:

1. That this appeal may be allowed.
2. That the amount of security may be fixed by the order allowing the appeal.
3. And that a transcript of the record papers and proceedings upon which the decree was made, duly authenticated, may be sent to the United States Supreme Court.

Dated July 14th, 1919.

J. S. WATSON,
N. C. YOUNG,
E. T. CONMY,
TRACY R. BANGS,
PHILIP R. BANGS,
C. J. MURPHY and
T. A. TONER,
Solicitors for Plaintiff.

117

Order Allowing Appeal.

Filed July 14, 1919.

Upon reading the petition of the plaintiffs for appeal, and consideration of the assignment of errors presented therewith,
It is ordered that the appeal, as prayed for, be, and the same hereby

is, allowed, and cost bond on appeal is hereby fixed at the sum of One Thousand Dollars (\$1,000.00).

For the purpose of removing any doubt as to the scope of the decree, the court adds that in passing upon the question whether the bill presents a case arising under the Federal Constitution, the Court passed and intended to pass on the merits. That seemed necessary. Otherwise if the court of review, should hold that this court erred in deciding that the amount in controversy does not exceed Three Thousand Dollars (\$3,000.00) the case might have to come back for a ruling here upon the other question, namely, whether the state action complained of in the bill deprives plaintiffs of any right secured to them by the Federal Constitution, with the right to a second appeal to review that ruling.

Notwithstanding the logical inconsistency of passing upon the merits, after deciding that the court was without jurisdiction this seemed better in the present case than to expose the parties to the hardship of two appeals to settle the basis legal questions raised by defendants' motion to dismiss, which had been fully argued at the bar and in elaborate written briefs, and submitted to the court for its decision.

Dated July 14th, 1919.

CHARLES F. AMIDON,
Judge.

118

Assignment of Errors.

Filed July 14, 1919.

(Title of Case.)

Now on this 14th day of July, 1919, come the plaintiffs above named, (appellants herein) by Messrs. N. C. Young, J. S. Watson, E. T. Conmy, Tracy R. Bangs, Philip R. Bangs, C. J. Murphy and T. A. Toner, their solicitors, and in connection with their petition for appeal say, that the final decree in said cause is erroneous and against the just rights of said plaintiffs and appellants for the following reasons:

1.

The court erred in granting defendants' motion to dismiss the action.

2.

The court erred in holding that the amount in controversy in this action does not exceed the sum of Three Thousand Dollars.

3.

The court erred in holding that the constitutional provisions and statutes of North Dakota, set out in the bill, do not violate the Fourteenth Amendment of the Federal Constitution.

4.

The court erred in entering the decree dismissing this case.
Wherefore the said plaintiffs pray that said decree be reversed.

J. S. WATSON,
N. C. YOUNG,
E. T. CONMY,
TRACY R. BANGS,
PHILIP R. BANGS,
C. J. MURPHY,
T. A. TONER,
Solicitors for Plaintiffs.

Bond.

Filed July 14, 1919.

(Title of Case.)

Know All Men by These Presents: That we, John W. Scott, William J. Howe, O. B. Severson, L. A. Wood, Nels Nichols, George Lener, Emil Scow, W. C. Martin, Henry McLean, George P. Omnes, B. W. Hersey, T. W. Baker, George Christianson, R. H. Witt, E. J. Megeath, E. A. Anderson, S. B. Oakley, O. F. Bryant, George D. Elliott, John Satterlund, P. S. Chaffee, Alfred Thuring, S. Garnett, J. E. Baker, John R. Early, H. C. Johnson, John C. Each, Fred Stechner, Fred L. Roquette, Iver K. Bakken, Michael Day, J. L. Harvey, William Burnett, Nathan Upham, Orlando Brown, J. C. Hanchett, W. W. Wilde, Arlo Andrews, Duncan Brown, W. W. Cofell, E. B. Roscoe and C. H. Kinney, as principals, and the Northern Trust Company, a corporation, as surety, are held and firmly bound unto Lynn J. Frazier, Wm. Langer, John N. Hagan, Carl Kozitsky, Obert Olson and Thomas Hall in the full sum of one thousand dollars (\$1,000.00) to be paid to the said Lynn Frazier, Wm. Langer, John N. Hagan, Carl Kozitsky, Obert Olson and Thomas Hall, or their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 14th day of July, 1919.

And, Whereas, later, on June 14, 1919, at a term of the District Court of the United States for the District of North Dakota, in a suit pending in said court between the above named plaintiffs and defendants, a decree was rendered against the said plaintiffs dismissing their action and for twenty dollars (\$20.00) costs, and the said plaintiffs having obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit.

Now the condition of the above obligation is such that if the said plaintiffs shall prosecute their appeal to effect and will pay the amount of said decree and answer all damages and

costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and effect.

JOHN W. SCOTT,
WILLIAM J. HOWE,
O. B. SEVERSON,
L. A. WOOD,
NELS NICHOLS,
GEORGE SIDENER,
EMIL HOWE,
W. C. MARTIN,
HENRY McLEAN,
GEORGE P. HOMNES,
B. W. HERSEY,
T. W. BAKER,
GEORGE CHRISTENSON,
R. H. LEVITT,
E. J. MEGEATH,
E. A. ANDERSON,
S. B. OAKLEY,
O. F. BRYANT,
GEORGE D. ELLIOTT,
JOHN SATTERLUND,
P. S. CHAFFEE,
ALFRED THURING,
J. S. GARNETT,
J. E. BAKER,
JOHN R. EARLY,
H. C. JOHNSON,
JOHN C. LEACH,
FRED STECKNER,
FRED L. ROQUETTE,
IVER K. BAKKEN,
MICHAEL TOAY,
J. L. HARVEY,
WILLIAM BURNETT,
NATHAN UPHAM,
ORLANDO BROWN,
J. O. HANCHETT,
W. W. WILDE,
ARLO ANDREWS,
DUNCAN BROWNLEE,
W. W. COFEL,
E. B. ROSCOE,
C. H. KINNEY,

By N. C. YOUNG,

One of their Attorneys.

NORTHERN TRUST COMPANY,

A CORPORATION,

By GEO. H. HOLLISTER, *Pres.*

(Corporate Seal.)

Sealed and Delivered in presence of A. A. Love, Jr., Catherine
Ryan.

STATE OF NORTH DAKOTA,
County of Cass, ss:

On this 14th day of July, A. D. 1919, before me, a Notary Public in and for said county and state, personally appeared Geo. H. Illister, known to me to be the President of the corporation named and which executed the foregoing instrument and acknowledged to me that such corporation executed the same. I further certify that I have examined the By-laws of said corporation, and find such officer authorized thereby to execute bonds and undertakings on behalf of said corporation.

[SEAL.]

G. A. CLEMENS,
Notary Public, Cass County, No. Dak.

My commission expires M'ch 4, 1922.

Approved:

CHARLES F. AMIDON,
Judge.

Notice of Filing Præcipe for Record.

Filed August 11th, 1919.

(Title of Case.)

Wm. Langer, Wm. Lemke and F. A. Pike, Attorneys for Defendants:

Please take notice that on the 19th day of July, 1919, the undersigned filed with the Clerk of the above Court a Præcipe for the record to be transmitted to the Supreme Court of the United States on appeal taken in the above case, a copy of which præcipe is herewith served on you.

Dated this 19th day of July, 1919.

J. S. WATSON,
N. C. YOUNG,
E. T. CONMY,
TRACY R. BANGS,
PHILIP R. BANGS,
C. J. MURPHY,
T. A. TONER,
Attorneys for Appellants.

Service of the within notice and copy of præcipe is hereby accepted this 20th day of July, 191—.

WM. LEMKE,
F. A. PIKE,
By WM. LEMKE,
Attorneys for Defendants.

Personal service of the within Notice of filing præcipe is hereby admitted this 21st day of July, A. D. 1919, at Fargo, N. D.

WILLIAM LANGER,
*Attorney for Defendants, Except
Frazier and Hagen Personally*

122 The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above case, for use of the Supreme Court of the United States, by including therein the following:

1. The plaintiffs' Bill in full, including the title but omitting title in all subsequent papers.
2. The defendants' Answer.
3. The Motion to dismiss signed by Wm. Langer, Attorney General.
4. The Amended Motion to dismiss signed by Wm. Lemke.
5. The Stipulation for the Dismissal of the Board of University and School Lands and Order dismissing them.
6. The Court's opinion.
7. The Decree.
8. Plaintiffs' Assignments of Error.
10. Appeal Bond and approval thereof.

Dated this 19th day of July, 1919.

J. S. WATSON,
N. C. YOUNG,
E. T. CONMY,
TRACY R. BANGS,
PHILIP R. BANGS,
C. J. MURPHY,
T. A. TONER,
Attorneys for Appellants

Citation.

UNITED STATES OF AMERICA:

To LYNN J. Frazier, William Langer, and John N. Hagen, acting and pretending to act as the Industrial Commission of North Dakota, LYNN J. Frazier, Carl Kozitsky, William Langer, Obert Olson, and Thomas Hall, acting as the State Auditing Board; Obert Olson, as State Treasurer of the State of North Dakota; Carl Kozitsky as State Auditor of the State of North Dakota, and LYNN J. Frazier as Governor of said State, William Langer, as Attorney General of said State, John N. Hagen, as Commissioner of Agriculture and Labor of said State, Thomas Hall, as Secretary of State of said State, and Minnie J. Nielson, as Superintendent of Public Instruction of said State and LYNN J. Frazier, William Langer, Thomas Hall, Carl Kozitsky, Obert Olson, John N. Hagen, and Minnie J. Nielson, individually, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, at the City of Washington, District of Columbia, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the United States District Court for the District of North Dakota, wherein John W. Scott, William J. Howe, O. B. Severson, L. A. Wood, Nels Nichols, George Sidener, Emil Scow, W. C. Martin, Henry McLean, George P. Hommes, B. W. Hersey, T. W. Baker, George Christenson, R. H. Levitt, E. J. Megeath, E. A. Anderson, S. B. Oakley, O. F. Bryant, George D. Elliott, John Satterlund, P. S. Chaffee, Alfred Thuring, J. S. Garnett, J. E. Baker, John R. Early, H. C. Johnson, John C. Leach, Fred Stockner, Fred L. Roquette, Iver K. Bakken, Michael Toay, J. L. Harvey, William Burnett, Nathan Upham, Orlando Brown, J. O. Hanchett, W. W. Wilde, Arlo Andrews, Duncan Brownlee, W. W. Cofell, E. B. Roscoe, C. H. Kinney, on behalf of themselves, and all other taxpayers of the state of North Dakota are appellants and you are appellees, to show cause, if any there be, why the Decree rendered against the said appellants as in said Appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Charles F. Amidon, Judge of the United States District Court for the District of North Dakota, this 14th day of July, A. D. 1919.

CHARLES F. AMIDON. *Judge.*

Personal service of the above citation is hereby admitted, by copy thereof, this 17th day of July, A. D. 1919.

WILLIAM LANGER,

Attorney General.

WM. LEMKE,
F. A. PIKE.

Solicitors for Appellees.

124 UNITED STATES OF AMERICA,
District of North Dakota, ss:

I, J. A. Montgomery, Clerk of the District Court of the United States for the District of North Dakota, do hereby certify that the foregoing pages, from 1 to 123, contain true and faithful transcripts of all pleadings, process and proceedings of record and on file in my office as said clerk, designated by the appellant and appellee, at the whole thereof, in the case of "John W. Scott et al, complainant versus Lynn J. Frazier et al, Defendants."

Witness my hand and the seal of said Court, at Fargo, this 11 day of August, A. D. 1919.

J. A. MONTGOMERY,
Clerk.

By E. R. STEELE,
Deputy.

File No. 27,263. North Dakota, D. C. U. S. Term No. 508. John W. Scott, William J. Howe, O. B. Severson et al., Appellants, Lynn J. Frazier et al. Filed August 22d, 1919. File No. 27,263.

FILED

DEC 15 1919

Supreme Court of the United States
IN EQUITY, No. 508.
OCTOBER TERM, 1919.

ES D. MAHER;
CLERK.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, L. A. WOOD, NELS NICHOLS, GEORGE SIDELER, EMIL SCOW, W. C. MARTIN, HENRY MCLEAN, GEORGE P. HOMNES, B. W. HERSEY, T. W. BAKER, GEORGE CHRISTENSON, R. H. LEVITT, E. J. MCGEATH, E. A. ANDERSON, T. B. OAKLEY, O. F. BRYANT, GEORGE D. ELLIOTT, JOHN SATTERLUND, P. S. CHAFFEE, ALFRED THURING, J. S. GARNETT, J. E. BAKER, JOHN R. EARLY, B. C. JOHNSON, JOHN C. LEACH, FRED STECKNER, FRED L. ROQUETTE, IVER K. BAKKEN, MICHAEL TOAY, J. L. HARVEY, WILLIAM BURNETT, NATHAN UPHAM, ORLANDO BROWN, J. O. HANCHETT, W. W. WILDE, ARLO ANDREWS, DUNCAN BROWNLEE, W. W. COFFEL, E. B. ROSCOE, C. H. KINNEY, ON BEHALF OF THEMSELVES, AND ALL OTHER TAXPAYERS OF THE STATE OF NORTH DAKOTA,
Plaintiffs in Error,

vs.

LYNN J. FRAZIER, WILLIAM LANGER AND JOHN N. HAGAN, ACTING AND PRETENDING TO ACT AS THE INDUSTRIAL COMMISSION OF NORTH DAKOTA; LYNN J. FRAZIER, CARL KOZITSKY, WILLIAM LANGER, OBERT OLSON, AND THOMAS HALL, ACTING AS THE STATE AUDITING BOARD, LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY AND MINNIE J. NIELSON, CONSTITUTING AND ACTING AS THE BOARD OF UNIVERSITY AND SCHOOL LANDS; OBERT OLSON AS STATE TREASURER OF THE STATE OF NORTH DAKOTA; CARL KOZITSKY AS STATE AUDITOR OF THE STATE OF NORTH DAKOTA; AND LYNN J. FRAZIER, AS GOVERNOR OF SAID STATE; WILLIAM LANGER AS ATTY. GEN. OF SAID STATE, JOHN N. HAGAN, AS COMMISSIONER OF AGRICULTURE AND LABOR OF SAID STATE, THOMAS HALL AS SECRETARY OF STATE OF SAID STATE; AND MINNIE J. NIELSON AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF SAID STATE; AND LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, OBERT OLSON, JOHN N. HAGAN, AND MINNIE J. NIELSON, INDIVIDUALLY,
Defendants in Error.

WILLIAM LEMKE,

Fargo, North Dakota,

FREDERIC A. PIKE,

St. Paul, Minnesota,

*Counsel for Lynn J. Frazier,
one of the defendants in error*

above named.



Supreme Court of the United States.

IN EQUITY, No. 508.

OCTOBER TERM, 1919.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, L. A. WOOD, NELS NICHOLS, GEORGE SIDELER, EMIL SCOW, W. C. MARTIN, HENRY MCLEAN, GEORGE P. HOMNES, B. W. HERSEY, T. W. BAKER, GEORGE CHRISTENSON, R. H. LEVITT, E. J. MCGEATH, E. A. ANDERSON, T. B. OAKLEY, O. F. BRYANT, GEORGE D. ELLIOTT, JOHN SATTERLUND, P. S. CHAFFEE, ALFRED THURING, J. S. GARNETT, J. E. BAKER, JOHN R. EARLY, B. C. JOHNSON, JOHN C. LEACH, FRED STECKNER, FRED L. ROQUETTE, IVER K. BAKKEN, MICHAEL TOAY, J. L. HARVEY, WILLIAM BURNETT, NATHAN UPHAM, ORLANDO BROWN, J. O. HANCHETT, W. W. WILDE, ARLO ANDREWS, DUNCAN BROWNEE, W. W. COFFEL, E. B. ROSCOE, C. H. KINNEY, ON BEHALF OF THEMSELVES, AND ALL OTHER TAXPAYERS OF THE STATE OF NORTH DAKOTA,

Plaintiffs in Error,

vs.

LYNN J. FRAZIER, WILLIAM LANGER AND JOHN N. HAGAN, ACTING AND PRETENDING TO ACT AS THE INDUSTRIAL COMMISSION OF NORTH DAKOTA; LYNN J. FRAZIER, CARL KOZITSKY, WILLIAM LANGER, OBERT OLSON, AND THOMAS HALL, ACTING AS THE STATE AUDITING BOARD, LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY AND MINNIE J. NIELSON, CONSTITUTING AND ACTING AS THE BOARD OF UNIVERSITY AND SCHOOL LANDS; OBERT OLSON AS STATE TREASURER OF THE STATE OF NORTH DAKOTA; CARL KOZITSKY AS STATE AUDITOR OF THE STATE OF NORTH DAKOTA; AND LYNN J. FRAZIER, AS GOVERNOR OF SAID STATE; WILLIAM LANGER AS ATTY. GEN. OF SAID STATE, JOHN N. HAGAN, AS COMMISSIONER OF AGRICULTURE AND LABOR OF SAID STATE, THOMAS HALL AS SECRETARY OF STATE OF SAID STATE; AND MINNIE J. NIELSON AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF SAID STATE; AND LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, OBERT OLSON, JOHN N. HAGAN, AND MINNIE J. NIELSON, INDIVIDUALLY,

Defendants in Error.

MOTION FOR ADVANCEMENT OF HEARING.

Now comes Lynn J. Frazier, as Governor of the State of North Dakota, one of the defendants in error above named, by his counsel William Lemke and Frederic A. Pike, and moves that the hearing of said cause in the Supreme Court of the United States be advanced upon the calendar to such earlier date as the Court may deem proper.

This motion is made upon the subjoined affidavit of Lynn J. Frazier, to which reference is made for a statement of the matter involved, with the reasons for this application.

December 11, 1919.

Respectfully submitted,

WILLIAM LEMKE,

FREDERIC A. PIKE,

*Counsel for Lynn J. Frazier,
one of the defendants in error
above named.*

AFFIDAVIT OF LYNN J. FRAZIER.

STATE OF NORTH DAKOTA, }
COUNTY OF BURLEIGH. } ss.

Lynn J. Frazier being duly sworn on his oath says that he is the Governor of the State of North Dakota, and Chairman of the Industrial Commission of North Dakota; and that as such he is one of the defendants in the above entitled cause.

This affiant further says that said action involves the validity of certain laws of the State of North Dakota, enacted by the Legislative Assembly of said State and approved February 25, 1919, said laws being respectively entitled as follows:

1: House Bill No. 17 entitled, "An Act Creating the Industrial Commission of North Dakota, authorizing it to

"conduct and manage on behalf of the State certain utilities, industries, enterprises and business projects and defining its powers and duties; and making an appropriation therefor," being Chapter 151, Laws of North Dakota for 1919.

2: House Bill No. 18 entitled, "An Act Declaring the purpose of the State of North Dakota to engage in the banking business and establish a system of banking under the name of the Bank of North Dakota, operated by the State, and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; making an appropriation therefor; and providing penalties for the violations of certain provisions thereof," being Chapter 147, Laws of North Dakota for 1919.

3: House Bill No. 49 entitled, "An Act providing for the issuing of bonds of the State of North Dakota in the sum of Two Million Dollars, to be known as 'Bonds of North Dakota, Bank Series'; prescribing the terms and stating the purposes thereof; providing a tax and making other provisions for the payment thereof; making appropriations for the payment of said bonds and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure', being Chapter 148, Laws of North Dakota for 1919.

4: Senate Bill No. 130 entitled, "An Act providing for the issuing of bonds of the State of North Dakota in a sum not exceeding Ten Million Dollars, to be known as 'Bonds of North Dakota, Real Estate Series'; prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal on said bonds, and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure," being Chapter 154,

Laws of North Dakota for 1919.

5: Senate Bill No. 20 entitled, "An Act Declaring the purpose of the State of North Dakota to engage in the business of manufacturing and marketing of farm products, and for establishing a warehouse, elevator and flour mill system under the name of North Dakota Mill and Elevator Association operated by the state, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management; and making an appropriation therefor," being Chapter 153, Laws of North Dakota for 1919.

6: Senate Bill No. 75 entitled, "An Act Providing for the issuing of bonds of the State of North Dakota in a sum not exceeding Five Million Dollars to be known as 'Bonds of North Dakota, Mill and Elevator Series'; prescribing the terms and stating the purposes thereof; providing for tax and making other provisions for the payment thereof of making appropriations and other provisions for the payment of interest and principal of said bonds and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure," being Chapter 154, Laws of North Dakota for 1919.

7: Senate Bill No. 19 entitled, "An Act Declaring the purpose of the State of North Dakota to engage in the enterprise of providing homes for residents of this state and to that end to establish a business system operated by the state under the name of The Home Building Association of North Dakota, and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; and making appropriation therefor", being Chapter 150, Laws of North Dakota for 1919.

Each of said laws is recited in full in the bill of complaint herein.

This affiant further says that on the 5th day of December 1919, the Legislative Assembly of North Dakota adopted a joint resolution as follows:

"WHEREAS, An action in equity in the District Court of the United States for the District of North Dakota has been begun under the title of John W. Scott, et al., against Lynn J. Frazier, et al., the purpose of which is to enjoin and prevent the operation of the laws enacted at the last session of this Legislative Assembly creating the Industrial Commission of North Dakota, the Bank of North Dakota, the Milling and Elevator Association and the Home Building Association, and providing for issuance of state bonds wherewith to finance those state enterprises; and whereas said action, after a hearing before the Hon. Charles F. Amidon, United States District Judge, was determined in favor of the defendants and against the plaintiffs, thereby holding the said laws to be valid and constitutional; and whereas the plaintiffs in said cause have appealed from the decision of the District Court of the United States to the Supreme Court of the United States and the appeal is now pending; and whereas this Legislative Assembly is advised that, in the usual course of business of the Supreme Court of the United States, in view of the large number of causes now waiting to be heard before that tribunal, the said case of *Scott, et al, against Frazier, et al.*, will not be heard in the Supreme Court for a period of about one year from this time or longer; and

"WHEREAS, the issues involved in said cause are of great public importance to the State of North Dakota and all its people, and involve matters of greatest moment in carrying forward the public policies of this State;

"NOW, THEREFORE, BE IT RESOLVED by the Legislative Assembly of the State of North Dakota: That it is desired by the State of North Dakota that the issues arising in said cause be heard and advanced to final judgment as soon as may be practicable; and that the Governor of this state, who is a party to said cause, as Governor and as Chairman of the Industrial Commission of North Dakota, be and he is hereby authorized, empowered and

"directed to take all proper and necessary measures for the
"advancement of the hearing of said cause before the Su-
"preme Court of the United States."

This affiant further says that this affidavit is made for the purpose of making application to the Supreme Court of the United States for an order advancing the hearing of said cause to an early date. To that end affiant submits the following recital of facts:

Upon the enactment and approval of the laws above designated, this affiant, together with other officials and individuals charged with the enforcement of said laws and with the performance of the duties thereby imposed, proceeded to execute said laws according to their terms. Thereafter the plaintiffs began this action.

The laws in question contemplate and provide for the inauguration and carrying on of certain public enterprises by and on behalf of the State of North Dakota. The successful prosecution of these enterprises requires funds in large amounts, and provision is made in the laws for obtaining such funds, through the issuance, negotiation and sale of bonds of the State. The availability of such bonds depends upon their marketability,—the readiness with which they may be sold to the public; and this in turn, of course, depends upon the validity of the bonds as obligations of the State. The validity of the bonds is attacked in this action; and although the laws authorizing the bonds have been adjudged valid by the Supreme Court of North Dakota and by the District Court of the United States for the district of North Dakota, nevertheless the pendency of this action upon appeal to the Supreme Court of the United States keeps open the question of their validity and makes the negotiation and sale of the bonds practically impossible until the determination of the appeal. The Industrial Commission of North Dakota has heretofore made with certain financial agents a contract for the sale of these bonds conditioned upon favorable opinion of legal counsel as to their validity; and recently,

as affiant is informed and believes, the opinion of such counsel has been rendered to prospective buyers to the effect that until decision of the pending appeal, the question of the validity of the bonds must be considered as undetermined; and so the sale has been prevented. Thus the funds intended and expected to be obtained by the State of North Dakota from the sale of bonds have not been forthcoming and cannot be obtained or become available for the purposes intended by law until this appeal shall have been determined by the Supreme Court of the United States.

The policies of the State of North Dakota declared and defined by these laws are of great public importance. The people of this State are engaged largely in agriculture and in allied industries. For many years they have considered and taken counsel together concerning the most useful and effective methods of promoting their industries by increasing the agricultural product of the State and by improving the methods of manufacturing and marketing such products. The laws here assailed are the result of the matured thought and determination of the people, and it is of the highest public importance that the policies so determined and declared by the State should be developed and fully executed.

The policies of the State declared by these laws include the establishment and maintenance by the State of a system of banking under the name of the Bank of North Dakota. The purpose of this system is to promote agriculture, commerce and industry. One of the means employed, as already inaugurated in the operation of the Bank, is a system of loans made by the Bank secured by real property situated within this State. The terms upon which such loans are made, as to rates of interest, periods of payment and other details, are such that, while the financial interests of the State as mortgagee are fully safeguarded, the obligations resting upon borrowers are made less burdensome than heretofore, so that encouragement is given to the development of agriculture and grazing, in which eighty-per cent of the population of the State are engaged, as well

as to the other industries dependent upon possession of land for maintenance. In a general way it may be said that this department of the activities of the State, as formulated in the operations of the Bank of North Dakota, is analogous to the system of farm loans in operation through the Federal Land Banks of the United States, with such variations as experience and the special needs of the people of the State have shown to be desirable.

In order to provide specific funds sufficient for the administration of the loan department of the Bank of North Dakota, the legislature authorized the issuance of State bonds, the aggregate amount of which shall not at any time exceed ten millions of dollars, these bonds to be based upon the real estate mortgages from time to time taken by the Bank, thus avoiding the tying up of any great amount of the public moneys in the loan operations so directed. It is apparent, then, that the negotiation of these bonds, the selling of them to investors, is essential to the benign purposes contemplated by the policy of the State. It is apparent also that any obstruction placed in the way of the negotiation and sale of these bonds is an obstruction to the policy of the State and tends importantly to defeat the intended good. Whatever, therefore, may be the purpose of the pending litigation, since it serves as an obstruction to the negotiation and sale of the bonds in question, it is so far forth an obstruction to the policy of the State and prevents the benefits that will follow the unhampered operation of that policy. This situation exhibits in one aspect the need for early determination of this litigation.

While the Bank is in full operation in other respects, and has employed some of the funds in its possession as deposits for making loans of the character described, and while there is no temporary restraining order in operation to limit the activities of the Bank in any of its functions, yet the pendency of this litigation, through the prevention of the use of bonds as means of securing funds, operates substantially as an effective restraint upon the Bank in this regard.

As has been stated, the Bank is in full operation in its various functions and has already rendered important benefits to the State in mobilizing the assets of the State and its entire financial worth, co-operating with all the banks and other financial agencies in the state, thereby enlarging the opportunity for the development of all the material interests of its people. A great institution is being established for handling the annual crops of the State without the inconvenience and loss incidental to reliance upon financial institutions outside the boundaries of the State, to which recourse has hitherto been customary, thus placing the great producing agricultural community of North Dakota upon a financial footing independent of the control of the money centers beyond its borders. But while this work has been well commenced, its development and successful application to the needs of the coming year, beginning with credits required in the purchase of seed grains for spring planting, will depend largely upon obtaining funds through the sale of bonds other than those mentioned above, which have also been authorized by the Legislature of the State in the aggregate sum of two millions of dollars for the purpose of supplying the Bank with a so-called capital fund available for the general purpose of its creation. These intended benefits also are obstructed and will be in large degree prevented by the continued pendency of this litigation.

In like manner the policy of the State is obstructed by its inability to sell still other bonds of the State intended to promote the development of certain elevator and milling enterprises projected by the State through this legislation. It is notorious that the grain growing interest of North Dakota has been handicapped, and both the grain producer and the consumer have been subjected to great and unnecessary charges and losses through the privately controlled system of elevators and mills which have taken toll in the process of distribution and manufacture of grain products.

The development of the policies of the State that are involved in the laws attacked in this litigation, and the relation

of those policies to the welfare of the State have been ably set forth in the opinion written by Judge Amidon in this case. (*Scott v. Frazier*, 258 Fed. Rep. 669.) Judge Amidon says, among other things:

"The people of North Dakota are farmers, many of them pioneers. Their life has been intensely individual. They have never been combined in corporate or other business organizations, to train them in their common interests or promote their general welfare. In the main they have made their purchases and sold their products as individuals. Nearly all their live stock and grain is shipped to terminal markets at St. Paul, Minneapolis and Duluth. There these products pass into the hands of large commission houses, elevator and milling companies, and live stock concerns. These interests are combined, not only in corporations, chambers of commerce, boards of trade, and interlocking directorates, but in the millions of understandings which arise among men having common interests and living through long terms of years in the daily intercourse of great cities. These common understandings need not be embodied in articles of incorporation or trust agreements. They may be as intangible as the ancient 'powers of the air.' But they are as potent in the economic world as those ancient powers were thought to be in the affairs of men. It is the potency of this unity of life of men dwelling together in daily intercourse that has caused all nations thus far to be governed by cities.

"As North Dakota has become more thickly settled and the means of intercourse have increased, the evils of the existing marketing system have been better understood. No single factor has contributed as much to that result as the scientific investigation of the state's Agricultural College and the federal experts connected with that institution. That work has been going on for a generation, and has been carried to the homes of the state by extension workers, the press, and the political discussion of repeated

"political campaigns. The people have thus come to believe that the evils of the existing system consist, not merely in the grading of grain, its weighing, its dockage, the price paid and the disparity between the price of different grades and the flour-producing capacity of the grain. They believe that the evil goes deeper; that the whole system of shipping the raw materials of North Dakota to these foreign terminals is wasteful and hostile to the best interests of the state. They say in substance:

"(1) The raw materials of the state ought to be manufactured into commercial products within the state. In no other way can its industrial life be sufficiently diversified to attain a healthy economic development.

"(2) The present system prevents diversified farming. The only way that can be built up is to grind the grain in the state which the state produces—keep the by-products of bran and shorts here, and feed them to live stock upon the farms of the state. In no other way can a prosperous live stock, dairy, and poultry industry be built up.

"(3) The existing marketing system tends directly to the exhaustion of soil fertility. In no way can soil depletion be prevented, except to feed out to live stock at least as much of the by-products of the grain raised upon the state's farms as that grain produces when ground, and thus put back into the soil, in the form of enriched manures, the elements which the raising of small grains takes from it.

"The present movement began at least as far back as 1911. In that year an amendment of the state Constitution was initiated, authorizing the state to acquire one or more terminal grain elevators and maintain and operate the same in such manner as the legislative assembly should prescribe. That amendment was adopted in 1913. From that time forward the discussion of the subject of marketing the products of the state has been the main theme of public thought. The movement has gone straight for-

"ward. The Constitution has been repeatedly amended,
 "including the amendments here assailed—all having for
 "their object the correction of the existing system of mar-
 "keting the state's products. Year by year the conviction
 "has deepened, in steadily increasing majorities, that pub-
 "lic ownership of terminal elevators, mills, and packing
 "houses is the only effective remedy to correct the evils
 "from which they believe themselves to be suffering. Their
 "decision is not a popular whim, but a deliberate convic-
 "tion, arrived at as a result of full discussion and repeat-
 "ed presentations of the subject at the polls. The acts
 "which the court is asked to restrain are not those of pub-
 "lic officials, who are pursuing enterprises of their own
 devising. Those acts express not simply the judgment of
 "the State Legislature. To authorize their enactment the
 "people of the state have redrawn their Constitution. That
 "is the highest and most deliberate act of a free people.
 "These constitutional amendments authorize and direct
 "the state to do what the defendants are threatening to do.
 Their acts are simply the carrying out of the mandate of
 "those constitutional amendments.

"It is hopeless to expect a population consisting of farm-
 "ers scattered over a vast territory as the people of this
 "state are to create any private business system that will
 "change the system now existing. The only means through
 "which the people of the state have had any experience in
 "joint action is their state government."

It is obvious that the outcome of this litigation is of supreme
 importance to this State. If the result is to disclose that the
 State has embarked upon enterprises repugnant to the consti-
 tution of the United States, it is desirable to know it as soon as
 practicable, in order that the State may revise its laws and re-
 model its enterprises in accordance with such determination.
 If on the other hand the decision reached by the District Court
 is to stand affirmed, it is greatly to be desired that such affirma-

tion may be soon determined, to the end that the policies of the State shall be developed without hindrance and the people enjoy the intended benefits without delay.

LYNN J. FRAZIER.

Subscribed and sworn to before me this 11th day of December, 1919.

JOSEPH COGHLAN,

Notary Public,

Burleigh County, North Dakota.

My commission expires September 20, 1923.

JAN 9 1920

JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

IN EQUITY, No. 508.

OCTOBER TERM, 1919.

John W. Scott, William J. Howe, O. B. Severson, L. A. Wood, Nels Nichols, George Sideler, Emil Scow, W. C. Martin, Henry McLean, George P. Homnes, B. W. Hersey, T. W. Baker, George Christenson, R. H. Levitt, E. J. McGeath, E. A. Anderson, T. B. Oakley, O. F. Bryant, George D. Elliott, John Satterlund, P. S. Chaffee, Alfred Thuring, J. S. Garnett, J. E. Baker, John R. Early, B. C. Johnson, John C. Leach, Fred Steckner, Fred L. Roquette, Iver K. Bakken, Michael Toay, J. L. Harvey, William Burnett, Nathan Upham, Orlando Brown, J. O. Hanchett, W. W. Wilde, Arlo Andrews, Duncan Brownlee, W. W. Coffel, E. B. Roscoe, C. H. Kinney, on behalf of themselves, and all other taxpayers of the State of North Dakota.

Plaintiffs in Error.

VS.

Lynn J. Frazier, William Langer, and John N. Hagan, acting and pretending to act as the Industrial Commission of North Dakota; Lynn J. Frazier, Carl Kozitsky, William Langer, Obert Olson and Thomas Hall, acting as the State Auditing Board; Lynn J. Frazier, William Langer, Thomas Hall, Carl Kozitsky, and Minnie J. Nielson, constituting and acting as the Board of University and School Lands; Obert Olson as State Treasurer of the State of North Dakota; Carl Kozitsky, as State Auditor of State of North Dakota; and Lynn J. Frazier, as Governor of said State; William Langer as Attorney General of said State, John N. Hagan, as Commissioner of Agriculture and Labor of said State; Thomas Hall as Secretary of State of said State; and Minnie J. Nielson as Superintendent of Public Instruction of said State; and Lynn J. Frazier, William Langer, Thomas Hall, Carl Kozitsky, Obert Olson, John N. Hagan, and Minnie J. Nielson, individually.

Defendants in Error.

Response by Plaintiffs In Error To Notice of Motion For Advancement

N. C. YOUNG,

E. T. CONMY,

Fargo, North Dakota.

TRACY R. BANGS,

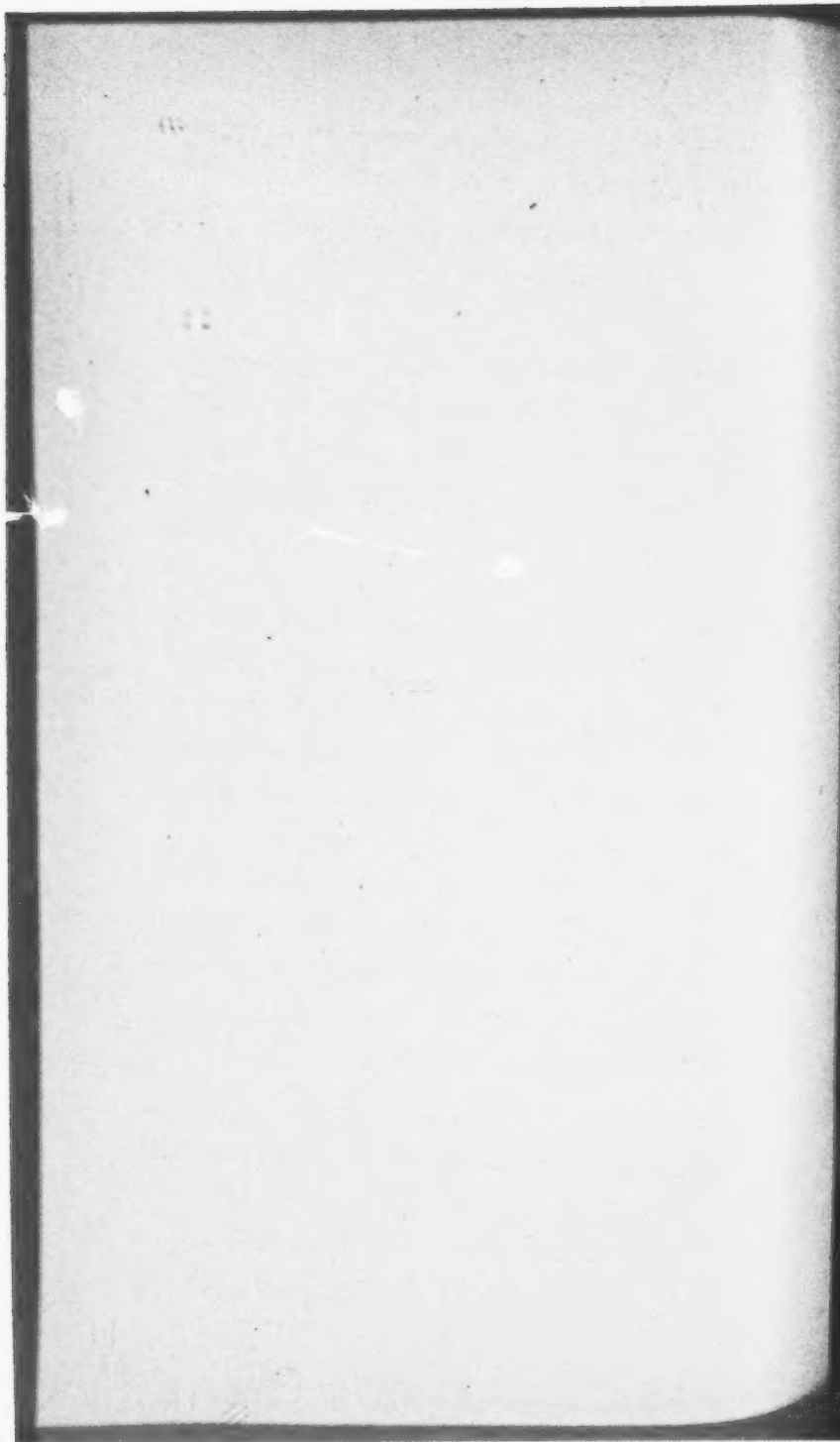
PHILIP R. BANGS,

CHARLES J. MURPHY,

T. A. TONER,

Grand Forks, North Dakota.

Counsel for Plaintiffs in Error.



SUPREME COURT OF THE UNITED STATES

IN EQUITY, No. 508.

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John W. Scott, William J. Howe, O. B. Severson,
L. A. Wood, Nels Nichols, George Sideler, Emil
Scow, W. C. Martin, Henry McLean, George P.
Homnes, B. W. Hersey, T. W. Baker, George
Christenson, R. H. Levitt, E. J. McGeath, E. A.
Anderson, T. B. Oakley, O. F. Bryant, George D.
Elliott, John Satterlund, P. S. Chaffee, Alfred
Thuring, J. S. Garnett, J. E. Baker, John R.
Early, B. C. Johnson, John C. Leach, Fred Steck-
ner, Fred L. Roquette, Iver K. Bakken, Michael
Toay, J. L. Harvey, William Burnett, Nathan
Upham, Orlando Brown, J. O. Hanchett, W. W.
Wilde, Arlo Andrews, Duncan Brownlee, W. W.
Coffel, E. B. Roscoe, C. H. Kinney, on behalf of
themselves, and all other taxpayers of the State
of North Dakota.

Plaintiffs in Error.

vs.

Lynn J. Frazier, William Langer, and John N. Hagan,
acting and pretending to act as the Industrial
Commission of North Dakota; Lynn J. Frazier,
Carl Kozitsky, William Langer, Obert Olson and
Thomas Hall, acting as the State Auditing

Board, Lynn J. Frazier, William Langer, Thomas Hall, Carl Kozitsky, and Minnie J. Nielson, constituting and acting as the Board of University and School Lands; Obert Olson as State Treasurer of the State of North Dakota; Carl Kozitsky as State Auditor of the State of North Dakota; and Lynn J. Frazier, as Governor of said State; William Langer as Attorney General of said State, John N. Hagan, as Commissioner of Agriculture and Labor of said State; Thomas Hall as Secretary of State of said State; and Minnie J. Nielson as Superintendent of Public Instruction of said State; and Lynn J. Frazier, William Langer, Thomas Hall, Carl Kozitsky, Obert Olson, John N. Hagan, and Minnie J. Nielson, individually,

Defendants in Error.

RESPONSE BY PLAINTIFFS IN ERROR TO
NOTICE OF MOTION FOR ADVANCEMENT

Come now the Plaintiffs in Error in the above entitled cause and responding, through their counsel, to the Motion for Advancement of said cause upon the calendar of the Supreme Court of the United States, respectfully state and show to the Court:

1. That the record in said case has not yet been printed.

2. That there are six defendants in error, three of whom, viz: Lynn J. Frazier, William Langer and John N. Hagan, constitute under the provisions of House Bill No. 17 set out in the Bill of Complaint, "The Industrial Commission of the State of North Dakota."

3. That the said William Langer is the Attorney General of the State of North Dakota, and as such is charged by the laws of the State with the defense of any officer of the State acting in an official capacity, and is by Section 3 of said House Bill No. 17 made the attorney for said Industrial Commission and as plaintiffs in error understand is in control of the defense of this case.

4. That this motion for advancement is made by one of said defendants in error and by private counsel who in the court below represented only the said Lynn J. Frazier and John N. Hagan, and the Plaintiffs in Error are not advised of the position of said Langer or of the Defendants in Error represented by him.

5. That the State of North Dakota is not a party to said action.

6. Plaintiffs in Error cannot consent or agree

to many matters set forth in the affidavit of Lynn J. Frazier upon which the motion to advance is based as to the necessity for the speedy operation of the laws referred to in said motion or of the claimed benefit to be derived by the people of the State of North Dakota through the operation of said Industrial system. On the contrary, assert the fact to be that the State of North Dakota is well supplied with all of the utilities provided for in the laws involved in this case as is fully set out and made to appear in the Bill of Complaint, which for the purposes of these proceedings is taken as true in all respects and which Bill of Complaint is filed herewith and to which reference is prayed.

7. That plaintiffs in error agree that the above entitled case is important and that the questions involved are of vital interest especially to the taxpayers of North Dakota. They admit that the right to put into operation laws authorizing the State to enter into general business enterprises, such as are provided for in the pretended constitutional amendments and laws set out in the complaint in this action, and in connection with such business to incur indebtedness and obligate the State without limit, should be settled with " convenient dispatch, and Plaintiffs in Error have no objection to the advancement of the cause should

the Court be of the opinion that the case is a proper one for advancement. However, in the event of the advancement of argument, counsel for Plaintiffs in Error ask that a reasonable time, considering the magnitude of the interests and questions involved, after the record has been printed, be allowed within which to prepare written briefs and argument for submission to the Court. Counsel for Plaintiffs in Error are of opinion that argument should not be advanced to a date earlier than May 1st, 1920.

N. C. YOUNG,

E. T. CONMY,

of Fargo, N. D.,

TRACY R. BANGS,

PHILIP R. BANGS,

CHARLES J. MURPHY,

T. A. TONER,

of Grand Forks, N. D.,

Solicitors for Plaintiffs in Error.



* IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF NORTH DAKOTA,
SOUTHEASTERN DIVISION.
IN EQUITY.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON,
L. A. WOOD, NELS NICHOLS, GEORGE SIDENER,
EMIL SCOW, W. C. MARTIN, HENRY MCLEAN,
GEORGE P. HOMNES, B. W. HERSEY, T. W. BAKER,
GEORGE CHRISTENSON, R. H. LEVITT, E. J.
MEGEATH, E. A. ANDERSON, S. B. OAKLEY, O. F.
BRYANT, GEORGE D. ELLIOTT, JOHN SATTERLUND,
P. S. CHAFFEE, ALFRED THURING, J. S. GARNETT, 2
J. E. BAKER, JOHN R. EARLY, H. C. JOHNSON,
JOHN C. LEACH, FRED STECKNER, FRED L.
ROQUETTE, IVER K. BAKKEN, MICHAEL TOAY, J. L.
HARVEY, WILLIAM BURNETT, NATHAN UPHAM,
ORLANDO BROWN, J. O. HANCHETT, W. W. WILDE,
ARLO ANDREWS, DUNCAN BROWNLEE, W. W.
COFELL, E. B. ROSCOE, C. H. KINNEY, on behalf
of themselves, and all other taxpayers of the State
of North Dakota. *Plaintiffs.*

vs.

LYNN J. FRAZIER, WILLIAM LANGER and JOHN N.
HAGAN, acting and pretending to act as the Industrial
Commission of North Dakota; LYNN J. FRAZIER,
CARL KOZITSKY, WILLIAM LANGER, OBERT OLSON,
and THOMAS HALL, acting as the State Auditing
Board; LYNN J. FRAZIER, WILLIAM LANGER,
THOMAS HALL, CARL KOZITSKY and MINNIE J.
NIELSON, constituting and acting as the Board of
University and School Lands; OBERT OLSON, as
State Treasurer of the State of North Dakota, CARL 4
KOZITSKY, as State Auditor of the State of North
Dakota, and LYNN J. FRAZIER, as Governor of said
State, WILLIAM LANGER, as Attorney General of
said State, JOHN N. HAGAN, as Commissioner of
Agriculture and Labor of said State, THOMAS HALL,
as Secretary of State of said State, and MINNIE
J. NIELSON, as Superintendent of Public Instruction
of said State, and LYNN J. FRAZIER, WILLIAM LAN-
GER, THOMAS HALL, CARL KOZITSKY, OBERT
OLSON, JOHN N. HAGAN and MINNIE J. NIELSON,
individually, *Defendants.*

* BILL OF COMPLAINT

(2)

*To the Honorable, the Judge of the District Court of
the United States for the District of North Dakota:*

The plaintiffs above named bring this, their bill
of complaint, against the defendants above named, and
thereupon complain and allege:

I.

That said plaintiffs are each and all citizens of the
United States and of the State of North Dakota, and
that their names, and the counties of their residence
in the said State are as follows:

John W. Scott, Grand Forks County; William J.
Howe, Cass County; O. B. Severson, Adams County;
L. A. Wood, Barnes County; Nels Nichols, Billings
County; George Sidener, Bottineau County; Emil
Scow, Bowman County; W. C. Martin, Burke County;
Henry McLean, Cavalier County; George P. Homnes,
Divide County; B. W. Hersey, Eddy County; T. W.
Baker, Foster County; George Christenson, Golden
Valley County; R. H. Levitt, Grant County; E. J.
Megeath, Hettinger County; E. A. Anderson, Kidder
County; S. B. Oakley, LaMoure County; O. F. Bry-
ant, Logan County; George D. Elliott, McHenry
County; John Satterlund, McLean County; P. S.
Chaffee, Mercer County; Alfred Thuring, Nelson
County; J. S. Garnett, Pembina County; J. E. Baker,
Ramsey County; John R. Early, Richland County; H.
C. Johnson, Sargent County; John C. Leach, Sioux

County; Fred Steckner, Slope County; Fred L. Roquette, Stark County; Iver K. Bakken, Steele County; Michael Toay, Stutsman County; J. L. Harvey, Town-
 er County; William Bennett, Traill County; Nathan Upham, Walsh County; Orlando Brown, Ward Coun-
 ty; J. O. Hanchett, Wells County; W. W. Wilde, Williams County; Arlo Andrews, Cass County; Dun-
 can Brownlee, Cass County; W. W. Cofell, LaMoure
 County; E. B. Roscoe, LaMoure County; C. H. Kin-
 ney, LaMoure County.

(3)

* II.

That the defendants are citizens of the United States and of the State of North Dakota, and are the duly elected, qualified and acting officers of the said State, as follows: Lynn J. Frazier, Governor; William Langer, Attorney General; John N. Hagan, Commis-
 sioner of Agriculture and Labor, Obert Olson, State Treasurer; Carl Kozitsky, State Auditor; Thomas Hall, Secretary of State, and Minnie J. Nielson, Superintendent of Public Instruction.

III.

That under section 375 of the Compiled Laws, North Dakota, 1913, the said Lynn J. Frazier as Governor, Carl Kozitsky as State Auditor, William Langer as Attorney General, Obert Olson as State Treasurer, and Thomas Hall as Secretary of State, constitute the State Auditing Board, and as such Board, audit all claims against the State prior to the issuance

13 of the State Auditor's warrant on the Treasurer in
payment thereof.

IV.

14 That under Section 156 of the Constitution of
North Dakota, Lynn J. Frazier as Governor, William
Langer as Attorney General, Thomas Hall as Secre-
tary of State, Carl Kozitsky, as State Auditor, and
15 Minnie J. Nielson as Superintendent of Public In-
struction, constitute the Board of University and
School Lands, and as such have control of the invest-
ment of the permanent school fund of the State de-
rived from the rental and sale of all school and uni-
versity lands given to the State in trust by the United
States for the support of public schools; and under
16 section 162 of the State Constitution are authorized
to invest such funds in State bonds. That said fund
now consists of \$919,730.16 in cash, \$10,276,964.99
in municipal bonds, \$5,661,253.61 in loans secured by
farm mortgages on property within the State of North
Dakota; and in addition thereto a large acreage of
16 lands and deferred * payments upon land sale contracts, (4)
of such value that the total amount of cash, bonds,
mortgages, lands and contracts exceed in value the
sum of \$50,000,000.00.

V.

That Obert Olson as State Treasurer is the cus-
todian of the State's funds derived from taxation, and
is also custodian of the state school fund, and dis-

burses such school fund upon warrants drawn by the
State Auditor. 17

• VI.

That Carl Kozitsky as State Auditor directs the
disbursement of the State funds by warrants upon the
State Treasurer in payment of moneys directed by law
to be paid out of the treasury, and by his warrant
directs the payment of the permanent school fund. 18

VII.

That under the pretended authority of House
Bill No. 17, passed by the Sixteenth Legislative As-
sembly of the State of North Dakota, which in form
took effect on Feb. 26th, 1919, and which is herein-
after set out in full, the defendants Lynn J. Frazier
as Governor, John N. Hagan as Commissioner of Agri- 19
culture and Labor, and William Langer as Attorney
General, claim and pretend to constitute the Indus-
trial Commission of North Dakota, and have organ-
ized, and are now acting as such Commission.

VIII.

That plaintiffs are taxpayers of the State of North 20
Dakota and are owners of both real and personal
property in this State, and in the counties of their resi-
dence, which is subject to taxation to meet the obli-
gations of the State, and also subject to local taxes.
That the plaintiffs, and the other taxpayers of the
State of North Dakota are the beneficial owners, sub-
ject to the legal and proper use thereof by the State

21 of North Dakota for State purposes, of all moneys
 and funds now in the treasury of the State of North
 Dakota, collected by taxation for * the purpose of de- (5)
 fraying the expenses of the government of the State,
 and which funds are held and controlled by the defend-
 ants, as officers of the State, as hereinbefore described.
 22 That said funds are held in trust by the defendants
 in their official capacity, for the plaintiffs and the
 other taxpayers of the State. That said funds now
 amount to more than Three Hundred Thousand Dol-
 lars. That from time to time additional sums of
 money, amounting to hundreds of thousands of dollars
 each year, raised by taxation against the property of
 23 plaintiffs, and the other taxpayers of the State of
 North Dakota, are being collected and covered into
 the treasury of the State, for the purpose of defraying
 the legitimate expenses of the State government, and
 the defendants, in their official capacity aforesaid,
 come into the custody and control of said moneys as
 the same are collected as hereinbefore set forth. That
 24 the State of North Dakota has no moneys, funds, or
 property, aside from that collected by the taxation of
 the property of the plaintiffs and the other taxpayers
 of the State, except moneys realized from school and
 institutional lands granted to the State by the United
 States at the time of admission to the Union. That
 said school and institutional lands and moneys real-
 ized therefrom cannot, under the compact with the

United States, be used for any purposes other than the maintenance and support of the schools and institutions of learning of the State and for the purpose of maintaining and supporting other public institutions of the State.

That the plaintiffs bring this action as taxpayers on behalf of themselves and on behalf of the other taxpayers of the state who are many thousand in number, and who have a common and general interest in the questions presented in this case, and are so numerous as to make it impracticable to bring them all before the court.

(6) * IX.

This is a suit in equity between the plaintiffs and the said defendants, and arises under the constitution and laws of the United States, as hereinafter will more particularly appear; and involves, exclusive of interest and costs, a sum or value in excess of \$300,000.00 of moneys now in the treasury of the State of North Dakota, derived from taxation of property and persons in said state, and \$17,000,000.00 in bonds of the State of North Dakota, to be issued as hereinafter set forth, which said bonds, if permitted to issue, create a charge upon the property of the State of North Dakota, which must be met by the taxation of the people and property of said state; and that each of the matters in controversy in this action, exceeds, exclusive of interest and costs, the sum or value of

29 three thousand dollars, and that each of said matters
arises under the constitution and laws of the United
States.

X.

That the defendants, assuming and claiming to
act as officers of the State, and in an official capacity,
and under the pretended authority of certain amend-
30 ments to the State constitution of North Dakota,
which are claimed to have become effective on or about
February 1st, 1919, and certain pretended acts of the
Sixteenth Legislative Assembly of North Dakota,
which in form took effect on the 26th day of February,
1919, all of which are hereinafter set out, threaten
31 to divert, pay out and transfer, and unless restrained
and enjoined by this court, will pay out, divert and
transfer from the general funds of the State, and from
funds of the cities, villages, townships and school dis-
tricts of the State derived from taxation, and from
the permanent school funds of the * State large sums (7)
of money in the purchase of the bonds herein referred
32 to and for other unlawful purposes; and threaten to
create and issue, and unless restrained and enjoined by
this court, will create and issue, obligations of the
State in the form of state bonds, aggregating in
amount the sum of \$17,000,000.00 for unlawful pur-
poses, and threaten to negotiate and sell, and unless
restrained and enjoined by this court, will negotiate
and sell said bonds, and will pledge the faith and credit
of the State of North Dakota for the payment thereof.

XI.

The defendants justify the acts of which complaint is made in this action by the alleged amendments to the state constitution approved on or about February 1st, 1919, and the pretended acts of the Sixteenth Legislative Assembly, approved February 26th, 1919, referred to in paragraph "X" hereof.

XII.

That prior to 1914, all constitutional amendments were initiated by the Legislature subject to the approval of the electors, such amendments being governed by Section 202 of the State Constitution, which in part reads as follows:

"Any amendment or amendments to this constitution may be proposed in either house of the legislative assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice, and if in the legislative assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislative assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the legislative assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislative assembly voting thereon,

37 such amendment or amendments shall become a part of the constitution of this State." * * *

In 1914, Section 202, just quoted, was amended by adding thereto the following:

38 * "Any amendment or amendments to this Con- (8)
stitution may also be proposed by the people by
* * * an initiative petition. When such pe-
tition has been properly filed the proposed amend-
ment or amendments * * * shall be placed
upon the ballot to be voted upon by the people
at the next general election. Should any such
amendment or amendments proposed by initiative
petition and submitted to the people receive a ma-
jority of all the legal votes cast at such general
election, such amendment or amendments shall be
referred to the next Legislative Assembly; and
should such proposed amendment or amendments
be agreed upon by a majority of all the members
elected to each House, such amendment or amend-
ments shall become a part of the Constitution of
this State. * * * "

XIII.

Prior to February 1st, 1919, Section 185 of the State constitution was in force and read as follows:

40 "Neither the State nor any county, city, town-
ship, town, school district, or any other political
subdivision shall loan or give its credit or make
donations to or in aid of any individual, associa-
tion or corporation except for necessary support
of the poor; nor subscribe to or become the owner
of the capital stock of any association or corpora-
tion, nor shall the State engage in any work of
internal improvement unless authorized by a two-
thirds vote of the people. PROVIDED, that the
State may appropriate money in the treasury or
to be thereafter raised by taxation for the con-
struction or improvement of public highways."

That on February 1st, 1919, the foregoing section was in form amended to read as follows:

"Section 185, Article 12 as amended by Article 18 of amendment. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business not prohibited by Article 20 of the Constitution (the manufacture and sale of intoxicating liquor), but neither the State nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation, except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

XIV.

That prior to February 1st, 1919, the State debt limit was fixed by Section 182 of the State Constitution at \$200,000, which so far as material, follows:

"The State may, to meet casual deficits or failure in the revenue, or in case of extraordinary emergencies, contract debts, but such debts shall never in the aggregate exceed the sum of two hundred thousand dollars, exclusive of what may be the debt of North Dakota at the time of the adoption of this Constitution. * * * No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for public defense, in case of threatened hostilities."

(9) * That said section 182 of the constitution was in form amended on February 1st, 1919, to read as follows:

"Section 182 in Article 12. The State may issue or guarantee the payment of bonds, provid-

45 ing that all bonds in excess of two million dollars
shall be secured by first mortgages upon real es-
tate in amounts not to exceed one half of its
value; or upon real estate and personal property
of state-owned utilities, enterprises or industries,
in amounts not exceeding its value, and provided,
46 further, that the State shall not issue or guaran-
tee bonds upon property of state-owned utilities,
enterprises or industries in excess of ten million
dollars. No future indebtedness shall be incurred
by the State unless evidenced by bond issue, which
shall be authorized by law for certain purposes,
to be clearly defined. Every law authorizing a
bond issue shall provide for levying an annual
tax, or make other provisions sufficient to pay the
interest semi-annually, and the principal within
thirty years from the passage of such law, and
shall specially appropriate the proceeds of such
tax, or of such other provisions to the payment
47 of said principal and interest, and such appro-
priation shall not be repealed nor the tax or other
provisions discontinued until such debt, both prin-
cipal and interest, shall have been paid. No debt
in excess of the limit named herein shall be in-
curred except for the purpose of repelling inva-
sion, suppressing insurrection, defending the State
in time of war, or to provide for the public de-
fense in case of threatened hostilities.

XV.

48 That the pretended amendments to Sections 182
and 185 of the State Constitution hereinbefore set out,
and the acts of the legislature of the State of North
Dakota, adopted in pursuance and under the pretended
authority thereof and referred to herein, are void and
of no force or validity, for the following reason,
among others, to-wit: That said constitutional amend-
ments were submitted and voted upon at the general

election held in the fall of 1918, and did not receive
a majority of all the legal votes cast at such election.

XVI.

That the Sixteenth Legislative Assembly of the
State of North Dakota, after in form approving the
constitutional amendments hereinbefore referred to,
and for the purpose of carrying out the Industrial
program thereunder and therein authorized, passed the
following acts, all of which were declared adopted by
sufficient vote to place them in operation on their ap-
proval, and which said pretended acts were approved
on February 26, 1919, to-wit: House Bills 17, 18 and
49, and Senate Bills 130, 20, 75 and 19.

* XVII.

That the several legislative acts above referred to
and here in question, for convenience of reference will
hereafter be referred to as follows:

House Bill 17 as "The Industrial Commission
Act."

House Bill 18 as "The Bank of North Dakota
Act."

House Bill 49 as "The Bank of North Dakota
Bond Act."

Senate Bill 130 as "The Bank of North Dakota
Real Estate Bond Act."

Senate Bill 20 as "The Mill and Elevator Asso-
ciation Act."

53 Senate Bill 75 as "The Mill and Elevator Association Bond Act."

Senate Bill 19 as "The Home Building Act."

Which said acts are now set out in full in the order in which they are above named.

34 INDUSTRIAL COMMISSION ACT — HOUSE
BILL NO. 17.
AN ACT

Creating the Industrial Commission of North Dakota, authorizing it to conduct and manage on behalf of the State, certain utilities, industries, enterprises and business projects, and defining its powers and duties; and
55 making an appropriation therefor.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF NORTH DAKOTA:

SECTION 1. A commission is hereby created and established to conduct and manage, on behalf of the State of North Dakota, certain utilities, industries,
59 enterprises and business projects, now or hereafter established by law. It shall be known as the Industrial Commission of North Dakota, but may be designated as the Industrial Commission.

SECTION 2. The Industrial Commission shall consist of three members, namely: The Governor, the Attorney General, and the Commissioner of Agriculture and Labor, of the State of North Dakota. Two

11) members shall constitute a quorum for the * transaction of business. The first meeting of the Commission shall be held in the office of the Governor, at his call, within twenty days after this Act goes into effect. Its meetings thereafter shall be held at such times and places as the Governor or a majority of the Commission may determine. It shall be provided by the proper authorities with suitably furnished offices at the seat of government. 57 58

SECTION 3. The Governor shall be the Chairman of the Industrial Commission, and its attorney shall be the Attorney General of the State. In the transaction of its general business it may employ secretaries and other subordinate officers, clerks and agents, on such terms as it may deem proper, appointing and discharging all persons so engaged when and as, in its judgment, the public interests may require. The Commission may require suitable bonds of any such secretary or other subordinate officer, clerk or agent, and shall fix the amount of the compensation of each. Such compensation together with other expenditures for operation and maintenance of the general business of the Commission, shall remain within the appropriation available in each year for such purpose. 59 8

SECTION 4. The Industrial Commission shall adopt and procure an official seal, and may authenticate therewith its documentary acts. All orders, rules,

61 regulations, by-laws and written contracts, adopted or
 authorized by the Commission shall, before becoming
 effective, be approved by the Governor, as Chairman,
 and shall not be in force unless approved and signed
 by him.

62 SECTION 5. The Industrial Commission is here-
 by empowered and directed to manage, operate, con-
 trol and govern all utilities, industries, enterprises and
 business projects, now or hereafter established, owned,
 undertaken, administered or operated by the State of
 North Dakota, except those carried on in penal, chari-
 table or educational institutions. To that end it shall
 have the power, in the exercise of its sound judgment,
 63 and is * hereby directed: (12)

(a) To determine the locations of such utilities,
 industries, enterprises and business projects.

64 (b) For the State, and in its name and behalf,
 in order to accomplish the purposes of this Act, to
 acquire by purchase, lease or by exercise of the right
 of eminent domain, as provided by Chapter 36 of the
 Code of Civil Procedure, Compiled Laws of 1913, all
 necessary properties and property rights and to hold
 and possess or to sell the whole or any part thereof;
 to construct and reconstruct necessary buildings there-
 on, to equip, maintain, repair, and alter any and all
 such properties and the improvements thereon; and
 generally to use the same so as to promote such utili-
 ties, industries, enterprises and business projects.

(c) To appoint a Manager, and all necessary subordinate officers and employees, of and for each such utility, industry, enterprise and business project; to constitute any such Manager its general agent in the performance of its duties in the particular utility, industry, enterprise or business project in which he shall be engaged, but subject, nevertheless, in such agency to the supervision, limitation and control of the Commission; to employ such contractors, architects, builders, attorneys, salesmen, clerks, accountants and other experts, agents and servants, as in the judgment of the Commission and the interests of the State may require; and to define the duties, designate the titles, and fix the compensation and bonds, of all such persons so engaged in each such utility, industry, enterprise and business project; provided, however, that subject to the control and regulation of the Commission the manager of each such utility, industry, enterprise and business project shall appoint and employ such deputies, assistants and other subordinates, and such contractors, architects, builders, attorneys, salesmen, clerks, accountants and other experts, agents and servants, as he shall in his judgment deem are required by the interests of the utility, industry, enterprise or business project of which he shall be in charge. The total compensation of such appointees and employees engaged in each several utility, industry, enterprise and business project * together with other expen-

6 ditures for the operation and maintenance thereof, shall remain within the appropriation and earnings lawfully available in each year for such purpose.

70 (d) To remove and discharge any and all persons appointed in the exercise of the powers granted by this Act, whether by the Commission or by any manager of any utility, industry, enterprise or business project; and any such removal may be made whenever in the judgment of the Commission the public interests require it; provided, however, that all appointments and removals contemplated by this Act shall be so made as the Commission shall deem most fit to promote the efficiency of the public service.

71 (e) To fix the buying price of things bought and the selling price of things sold, incidental to the said utilities, industries, enterprises and business projects, and to fix rates and charges for any and all services rendered thereby. In fixing such prices, rates and charges, the Commission shall make provision for
72 accumulating a fund with which to replace, in the general funds of the State, the amount received by the Commission under the appropriation made in this Act, as may be directed by the legislative assembly.

(f) To make rules, regulations, orders and by-laws for the management and operation, and for the transaction of the business, of such utilities, industries, enterprises and business projects.

(g) To procure the necessary funds for such
 utilities, industries, enterprises and business projects
 by negotiating the bonds of the State of North Da-
 kota in such amounts and in such manner as may be
 provided by law. 73

(h) To conduct investigations of all matters
 directly or indirectly connected with, or bearing upon
 the success of, any of the utilities, industries, enter- 74
 prises, and business projects under its management,
 and of all matters which may directly or indirectly
 affect the methods, operations, processes, products or re-
 sults thereof. In aid of any such investigation the Com-
 missioner * shall have the power to summon and com-
 pel the attendance of witnesses, and to examine them 75
 under oath, which any member thereof shall have the
 power to administer. It shall have access to and may
 order the production of, all books, accounts, papers
 and property, material to such investigation. Wit-
 nesses other than those in the employ of the state shall
 be entitled to the same fees as in civil cases in the dis-
 trict court. The claim that any testimony or evidence 76
 sought to be elicited or produced on such examination
 may tend to criminate the person giving or producing
 it, or expose him to public ignominy, shall not excuse
 him from testifying or producing evidence, documen-
 tary or otherwise; but no person shall be prosecuted
 or subjected to any penalty or forfeiture for and on
 account of any matter or thing concerning which he

77 may testify or produce such evidence; provided, that
 he shall not be exempted from prosecution and punish-
 ment for perjury committed in so testifying. It shall
 be the duty of the Commission to cause the testimony
 so taken to be transcribed and filed in the office of the
 Commission at the seat of government, within ten days
 after it is taken, or as soon thereafter as practicable,
 78 and when so filed it shall be open for inspection by any
 person. Any person failing or refusing to obey the
 order of the Commission issued under the provisions
 of this section, or to give or produce evidence when
 required, shall be reported by the Commission to the
 district court or any judge thereof, and shall be dealt
 with by the court or judge as for contempt of court.

79 (i) To make rules and regulations for its own
 procedure; and to do any and all things necessary or
 expedient in conducting the business of such utilities,
 industries, enterprises and business projects, and in the
 accomplishment of the purposes of this Act.

SECTION 6. The Industrial Commission shall
 80 prepare an annual report and file it in the office of the
 Secretary of * State not later than the first day of Feb- (1)
 ruary of each year. The report shall contain an item-
 ized account of its expenditures and a complete and
 detailed financial statement of each utility, industry,
 enterprise and business project under its control, show-
 ing fully all items of income and disbursements and
 liabilities of every nature for the calendar year ending

December 31st next preceding. The report shall also
 set forth a list of all persons in the employ of the
 Commission, with the name of each person drawing
 a salary under its authority, the amount of the salary
 and all other emoluments received, and the fund from
 which drawn. 81

SECTION 7. There is hereby appropriated out
 of the general funds of the State, not otherwise ap- 82
 propriated, two hundred thousand dollars, or so much
 thereof as may be necessary, to carry out the provi-
 sions of this Act. This appropriation is hereby made
 available immediately upon the passage and approval
 of this act.

SECTION 8. This Act is hereby declared to be 83
 an emergency measure and shall take effect and be in
 force from and after its passage and approval.

BANK OF NORTH DAKOTA ACT—HOUSE
 BILL NO. 18
 AN ACT

Declaring the purpose of the State of North Dakota 84
 to engage in the banking business and establishing a
 system of banking under the name of the Bank of
 North Dakota, operated by the State, and defining the
 scope and manner of its operation and the powers and
 duties of the persons charged with its management;
 making an appropriation therefor; and providing pen-
 alties for the violations of certain provisions thereof:

BE IT ENACTED BY THE LEGISLATIVE
ASSEMBLY OF THE STATE OF NORTH
DAKOTA:

* SECTION 1. For the purpose of encouraging (10
and promoting agriculture, commerce and industry, the
State of North Dakota shall engage in the business
of banking, and for that purpose shall, and does here-
by, establish a system of banking owned, controlled
and operated by it, under the name of the Bank of
North Dakota.

SECTION 2. The Industrial Commission shall
operate, manage and control the Bank of North Da-
kota, locate and maintain its places of business, of
which the principal place shall be within the State,
and make and enforce orders, rules, regulations and
by-laws for the transaction of its business. The busi-
ness of the Bank, in addition to the other matters
herein specified, may include anything that any bank
may lawfully do, except as herein restricted; but this
provision shall not be held in any way to limit or
qualify either the powers of the Industrial Commission
herein granted, or the functions of said Bank herein
defined. The Industrial Commission shall meet with-
in twenty days after the passage and approval of this
Act to begin the organization of the Bank.

SECTION 3. To accomplish the purposes of
this Act, the Industrial Commission shall acquire by
purchase, lease or by exercise of the right of eminent

domain, as provided by chapter 36 of the Code of Civil Procedure, Compiled Laws of 1913, all requisite property and property rights, and may construct, remodel and repair buildings; but it shall not invest more than ten per cent of the capital of the bank in furniture, fixtures, lands and buildings for office purposes.

SECTION 4. The Industrial Commission shall obtain such assistance as in its judgment may be necessary for the establishment, maintenance and operation of the Bank. To that end it shall appoint a manager, and may appoint such subordinate officers and employees as it may judge expedient. It may constitute such manager its general agent, in respect to the functions of said * Bank, but subject, nevertheless, in such agency, to the supervision, limitation and control of the Commission. It shall employ such contractors, architects, builders, attorneys, cashiers, tellers, clerks, accountants, and other experts, agents and servants as in the judgment of the Commission the interests of the state may require, and shall define the duties, designate the titles, and fix the compensation and bonds of all such persons so engaged; provided, however, that subject to the control and regulation of the Commission, the Manager of the bank shall appoint and employ such deputies, cashiers, tellers, and other subordinates, and such contractors, architects, builders, attorneys, clerks, accountants and other experts, agents and servants, as he shall, in his judgment, deem are re-

23 required by the interest of the Bank. The total com-
 pensation of such appointees and employees, together
 with other expenditures for the operation and main-
 tenance of the Bank, shall remain within the appro-
 priation and earnings lawfully available in each year
 for such purpose. All officers and employees of the
 24 Bank engaged upon its financial functions shall, be-
 fore entering upon their duties, respectively furnish
 good and sufficient bonds to the State in such amount
 and upon such conditions as the Commission may re-
 quire and approve; but the bond of the manager shall
 not be less than fifty thousand dollars. Such bond shall
 be filed with the Secretary of State.

25 SECTION 5. The Industrial Commission may
 remove and discharge any and all persons appointed
 in the exercise of the powers granted by this Act,
 whether by the Commission or by the Manager of the
 Bank, and any such removal may be made whenever
 in the judgment of the Commission the public inter-
 ests require it; provided, however, that all appoint-
 26 ments and removals contemplated by this Act shall
 be so made as the Commission shall deem most fit to
 promote the efficiency of the public service.

SECTION 6. The Bank shall be opened and
 shall proceed to *transact business whenever there shall (18)
 be delivered to the Industrial Commission bonds in
 the sum of two million dollars issued by the State as
 may be provided by law for such purpose. The fund

procured by the negotiation and sale of such bonds is
 hereby designated and shall be known as the capital
 of said Bank. 97

SECTION 7. All state, county, township, muni-
 cipal and school district funds, and funds of all penal,
 educational and industrial institutions and all other
 public funds shall be, by the persons having control 98
 of such funds, deposited in the Bank of North Dakota
 within three months from the passage and approval
 of this Act, subject to disbursement for public pur-
 poses on checks drawn by the proper officials in the
 manner now or hereafter to be provided by law; pro-
 vided, however, that on a proper showing made by any
 official having control of public funds, the Industrial 99
 Commission may permit a postponement of the de-
 posit of such funds or any part thereof in the Bank
 of North Dakota, the period of such postponement
 not to exceed six months. And provided further, that
 if any such funds are now loaned by authority of law
 under a contract terminating at a future time, then the
 deposit of such funds in the Bank of North Dakota 100
 shall not be required until two months after the time
 of expiration of such contract. Any person who shall
 violate any of the provisions of this Section shall be
 guilty of a misdemeanor and upon conviction thereof
 shall be punished by imprisonment in a county jail for
 not less than ninety days, and by a fine of not less
 than one hundred dollars.

101

SECTION 8. Whenever any of the public funds hereinbefore designated shall be deposited in the Bank of North Dakota, as hereinbefore provided, the official having control thereof, and the sureties on the bond of every such official, shall be exempt from all liability by reason of the loss of any such deposited funds while so deposited.

101

* SECTION 9. The Bank of North Dakota may receive deposits from any source, including the United States Government and any foreign or domestic individual, corporation, association, municipality, bank or government. Funds may be deposited to the credit of the Bank of North Dakota in any bank or agency approved by the Industrial Commission.

101

SECTION 10. All deposits in the Bank of North Dakota are hereby guaranteed by the State. Such deposits shall be exempt from state, county and municipal taxes of any and all kinds.

101

SECTION 11. Funds deposited by State Banks in the Bank of North Dakota shall be deemed "available funds" within the meaning of that term as used in Section 5170 of the Compiled Laws of 1913. For banks that make the Bank of North Dakota a reserve depository, it may perform the functions and render the services of a clearing house, including all facilities for providing domestic and foreign exchange, and may re-discount paper, on such terms as the Industrial Commission shall provide.

SECTION 12. The Industrial Commission unless otherwise limited by law, shall from time to time fix the rates of interest allowed and received in transactions of the Bank. Such rates shall be as nearly uniform and constant as practicable, and shall not be fixed or changed to work any discrimination against or in favor of any person or corporation. But in respect to time deposits received by the Bank, transactions may be reasonably classified as to the amounts and the duration of time involved, and a reasonable differentiation of interest rates based on such classification may be allowed. When interest is allowed on any deposits it shall not be less than one or more than six per cent. The Industrial Commission shall also fix reasonable charges, without unjust discrimination, for any and all services rendered by the Bank.

* SECTION 13. All checks and other instruments and items of exchange payable on demand, sent by the Bank of North Dakota to any State Bank or banking association in North Dakota, for collection, shall be by such State Bank or banking association remitted for at par to the Bank of North Dakota. Any person or corporation who shall violate any of the provisions of this section shall be guilty of a misdemeanor.

SECTION 14. The Bank of North Dakota may deposit funds in any bank or banking association with or without the State upon such terms and conditions as the Industrial Commission shall determine.

109 SECTION 15. The Bank of North Dakota may
 transfer funds to other departments, institutions, utili-
 ties, industries, enterprises or business projects of the
 State, which shall be returned with interest to the
 Bank. It may make loans to counties, cities or politi-
 cal subdivisions of the State, or to state or national
 110 banks, on such terms, and under such rules and regu-
 lations, as the Industrial Commission may determine;
 but it shall not make loans or give its credit to any
 individual, association or private corporation, except
 that it may make loans to any individual, association
 or private corporation, secured by duly recorded first
 mortgages on real estate in the State of North Dako-
 111 ta in amounts not to exceed one half the value of the
 security, or secured by warehouse receipts issued by
 the Industrial Commission or by any licensed ware-
 house within the State, in amounts not to exceed nine-
 ty per cent of the value of the commodities evidenced
 thereby. It shall not, however, loan on real estate
 security more than thirty per cent of its capital, nor
 112 in addition thereto, more than thirty per cent of its
 capital, nor in addition thereto, more than twenty per
 cent of its deposits. Additional funds that may be re-
 quired for such real estate loans, shall be procured
 from the sale of State bonds as may be provided by
 law.

* SECTION 16. The Industrial Commission shall (21)
 prescribe form of application for a mortgage loan on

real estate, and shall provide for appraisal of the proposed security. Until otherwise provided by the Commission, when an application for a mortgage loan on real estate is made, it shall be referred to the Commissioner of University and School Lands, for appraisal of the proposed security. The Commissioner of University and School Lands shall thereupon promptly cause it to be appraised in the same manner as school lands are appraised, and upon completion of such appraisal, shall return the application, together with the appraisal, to the Bank. Thereupon the Bank shall promptly determine whether to grant or refuse any part or all of such loan.

SECTION 17. Every such mortgage shall contain an agreement providing for the repayment of the loan on an amortization plan by means of a fixed number of annual installment; sufficient to cover, first, a charge on the loan, at a rate not exceeding the interest rate in the last series of real estate loan bonds issued, if any, by the State of North Dakota; second, a charge for administration and surplus, at a rate not exceeding one per cent per annum on the unpaid principal, said two rates combined constituting the interest rate on the mortgage; and, third, such amounts to be applied on the principal as will extinguish the debt in not less than ten nor more than thirty years; provided, however, that advance payment of one or more annual installments, for the reduction of the principal, or the

117 payment of the entire principal, may be made at any
regular installment date; and provided further, that in
case of a crop failure which reduces the mortgagor's
reasonable crop income by one half, all payments un-
der said mortgage may, in the discretion of the In-
dustrial Commission, be extended for one year, upon
condition that on the payment of all installments, such
118 further annual payments * shall be made as will pay the (22)
interest, with interest thereon, for the years for which
no payments were made. The Industrial Commission
shall determine whether a mortgagor is entitled to an
extension of the payment of any installment, under
the provision of this Section.

119 SECTION 18. Every such mortgage, and the
note or other obligation thereby secured, shall run to
"The Manager of the Bank of North Dakota, his suc-
cessors in office or his assigns," as payee and mortga-
gee, and shall contain a recital that it is executed and
delivered in conformity with and upon the conditions
expressed in this Act, designated by its title and the
120 date of its approval. After having been duly recorded
in each county in which the lands therein described
are situated, every such mortgage shall be delivered
to the Manager of said Bank and together with said
note or other obligation shall be held by the manager
as a part of the assets of the Bank, or shall be other-
wise disposed of as hereafter provided. If so held,
payments upon the note or other obligation secured by

said mortgage shall be made to the Bank of North Dakota, and whenever it shall have been fully paid, the Manager shall promptly satisfy and discharge the mortgage lien of record and deliver the mortgage cancelled, with a satisfaction thereof, to the person entitled to receive it. 121

SECTION 19. Every such mortgage, together with the note or other obligation thereby secured, may be sold and assigned upon the payment to the Bank of the full value thereof, and upon such sale and assignment the Manager may endorse either with or without recourse. In that case payments upon said note or other obligation shall be made to the person entitled to receive them; but each such assignment shall be made subject to the provisions concerning extension of the time of payments on account of crop failures as provided in Section 17 of this Act, and subsequent action of the Industrial Commission in that regard shall be binding upon the assignee of such mortgage; provided, however, that after assignment of such mortgage extensions of payments for a yearly period shall be limited in total number to not more than one for every period of five years or fraction thereof during which such mortgage has to run after the date of assignment. 122 123 124

SECTION 20. Every such mortgage, together with the note or other obligation thereby secured, may be assigned, and upon order of the Industrial Commis-

125 sion shall be assigned, to the State Treasurer of the
 State of North Dakota as security for bonds to be
 issued by the State as provided by law. In case of
 such assignment all payments due upon said note or
 other obligation shall be made to the State Treasurer,
 and the money so by him received shall be by him held
 or disbursed as may be provided by law. If while any
 126 such mortgage so assigned to the State Treasurer is in
 his hands, the note or obligation thereby secured shall
 have been fully paid, the State Treasurer shall so cer-
 tify to the Manager of the Bank, who shall thereupon
 proceed to satisfy said mortgage in the same manner
 as though said note or other obligation had been paid
 directly to the Bank. In case of such assignment to
 127 the State Treasurer of any such mortgage, the pro-
 visions contained in Section 19 of this Act, respecting
 extensions on account of crop failure, shall be effective
 and shall be applied.

SECTION 21. All business of the Bank may be
 conducted under the name of "The Bank of North
 128 Dakota." Title to property pertaining to the opera-
 tion of the Bank shall be obtained and conveyed in the
 name of "The State of North Dakota, doing business
 as the Bank of North Dakota." Written instruments
 shall be executed in the name of the State of North
 Dakota, signed by any two members of the Industrial
 Commission, of whom the Governor shall be one, or
 by the manager of the Bank of North Dakota, within

the scope of his authority so to do as defined by the Industrial Commission. 129

* SECTION 22. Civil actions may be brought against the State of North Dakota on account of causes of action claimed to have arisen out of transactions connected with the operation of the Bank of North Dakota, upon condition that the provisions of this section are complied with. In such actions the State shall be designated as "The State of North Dakota, doing business as the Bank of North Dakota," and the service of process therein shall be made upon the Manager of said Bank. Such actions may be brought in the same manner and shall be subject to the same provisions of law as other civil actions brought pursuant to the provisions of the Code of Civil Procedure. Such actions shall be brought, however, in the county where the Bank of North Dakota shall have its principal place of business, except as provided in Sections 7415, 7416 and 7418, Compiled Laws of North Dakota, 1913. The provisions of sections 375 and 657 of the Compiled Laws of 1913 shall not apply to claims against the State, affected by the provisions of this section. 130 131 132

SECTION 23. The State Examiner shall personally or through deputy examiners, visit the Bank of North Dakota at least twice annually, and shall inspect and verify the assets in its possession and under its control, with sufficient thoroughness of investigation

133 to ascertain with reasonable certainty whether the val-
uations are correctly carried on its books. He shall
investigate its methods of operation and accounting.
He shall report the results of each such examination
and investigation to the Industrial Commission as soon
as practicable, and to the Legislative Assembly at its
134 next ensuing session, and, as provided in paragraph
numbered 5 of section 5146 of the Civil Code, Com-
piled Laws, 1913, to the State Banking Board.

* SECTION 24. There is hereby appropriated (25
out of the general funds of the State not otherwise
appropriated, one hundred thousand dollars, or so
135 much thereof as may be necessary to carry out the pro-
visions of this Act. This appropriation is hereby made
available immediately upon the passage and approval
of this Act. The Industrial Commission shall, out of
the earnings of the Bank, make provision for accu-
mulating a fund with which to replace in the general
136 funds of the State the amount received by the Com-
mission under this appropriation, as may be directed
by the Legislative Assembly.

SECTION 25. All acts and parts of acts in-
consistent with this Act are hereby repealed.

SECTION 26. This Act is hereby declared to
be an emergency measure and shall take effect and be
in force from and after its passage and approval.

BANK OF NORTH DAKOTA BOND ACT— 137
 HOUSE BILL NO. 49
 AN ACT

Providing for the issuing of bonds of the State of North Dakota in the sum of two million dollars, to be known as "Bonds of North Dakota, Bank Series"; prescribing the terms, and stating the purposes thereof; providing a tax and making other provision for the payment thereof; making appropriations for the payment of said bonds and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure. 138

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF NORTH DAKOTA: 139

SECTION 1. The State Treasurer is hereby directed forthwith to prepare for issue, and the Governor and the State Treasurer are hereby authorized, empowered and directed to issue, negotiable bonds of the State of North Dakota in the aggregate * amount of two million dollars. They shall be executed by the Governor and the State Treasurer under the great seal of the State, and shall be attested by the Secretary of State. The Auditor and Secretary of State shall endorse and sign on each such bond a certificate showing that it is issued pursuant to law and is within the debt limit. The bonds so issued shall be designated "Bonds of North Dakota, Bank Series." 140

141 SECTION 2. The bonds so issued shall be pay-
able to the purchaser or bearer; provided, however,
that the provisions of Section 151 Compiled Laws of
1913 are hereby declared to apply to them. They shall
be issued in denominations of from five dollars to ten
thousand dollars, and shall be payable in not less than
142 ten nor more than thirty years from the passage of
this act. They shall bear interest at a rate not ex-
ceeding six per cent per annum from their date until
maturity, payable semi-annually on the first day of
January and of July in each year; and coupons shall
be attached to each bond, evidencing the amount of
interest payable at each first day of January and July
143 until maturity. Principal and interest shall be payable
at the office of the State Treasurer in Bismarck. The
terms of said bonds, as to values of denominations,
periods of maturity and rates of interest, shall be fixed
by the Governor in his sound judgment, within the
limitations above stated. Every such bond and coupon
must be presented for payment at the office of the
144 State Treasurer within six years from the date of its
maturity; and no such bond or coupon shall bear in-
terest after maturity unless payment thereof shall not
be made upon due presentation for payment. All said
bonds shall be exempt from state, county and municipi-
pal taxes of any and all kinds.

SECTION 3. The said issue of bonds is auth-
orized for the purpose of making delivery thereof to

27) the Industrial * Commission of North Dakota is here-
 inafter provided, and as contemplated by section six
 of the act entitled "An Act declaring the purpose of
 the State of North Dakota to engage in the banking
 business and establishing a system of banking under
 the name of the Bank of North Dakota, operated by
 the State, and defining the scope and manner of its
 operation and the powers and duties of the persons
 charged with its management; making an appropri-
 ation therefor; and providing penalties for the violation
 of certain provisions thereof," enacted the year 1919
 by the Sixteenth Session of the Legislative Assembly
 of North Dakota, being House Bill number 18 and also
 by Section 5, paragraph (g) of the Act entitled "An
 Act creating the Industrial Commission of North Da-
 kota, authorizing it to conduct and manage on behalf
 of the State certain utilities, industries, enterprises and
 business projects, and defining its power and duties,
 and making an appropriation therefor," enacted in the
 year 1919 by the Sixteenth Session of the Legislative
 Assembly of North Dakota, being House bill No.
 17, and for the purpose of enabling the In-
 dustrial Commission to negotiate and sell such bonds,
 pursuant to the provisions of this Act and of said Sec-
 tion Five, paragraph (g) of the Act entitled as last
 above stated, being House Bill Number 17 of the Six-
 teenth Session of the Legislative Assembly of North
 Dakota in the year 1919; thereby to procure the fund

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to be designated as the capital of the Bank of North Dakota.

SECTION 4. In furtherance of the purposes declared by this Act, it is hereby made the duty of the Governor and the State Treasurer, after the issue, execution, sealing and attestation of said bonds to deliver them to the Industrial Commission in such denominations and amounts bearing interest at such rates, and running to such periods of maturity, as may be * determined by the Governor, in his discretion, upon consideration of such recommendations as the Commission may make in regard thereto. The Industrial Commission is empowered, authorized and directed, in connection with and in addition to its other powers and duties, to act as the agent of the State for the negotiation, sale and delivery of said bonds. It shall sell them for cash in such manner and at such terms as in its sound discretion it shall deem most advantageous to the interests of the State. The Commission is hereby authorized to receive all moneys paid by buyers of said bonds, upon the sale thereof, and upon receipt of the purchase price to deliver to each purchaser the bonds by him purchased. Upon such delivery of bonds so purchased and paid for, the faith and credit of the State of North Dakota is pledged for the payment thereof, both principal and interest, to the lawful holder and owner thereof upon presentation for payment, according to law. The moneys so derived

and received from the sale of said bonds shall constitute the fund to be designated as the capital of the Bank of North Dakota, and shall be so employed by the Industrial Commission. Nothing in this Act, however, shall be construed to prevent the purchase of any of said bonds with any funds in the Bank of North Dakota.

SECTION 5. From time to time the Industrial Commission shall, out of the earnings derived from the operation of the Bank of North Dakota, pay to the State Treasurer such moneys as the Commission shall deem available to devote to the purpose of paying said bonds and interest. In making such payment the Commission shall file a statement with the State Treasurer specifying the purpose of such payment. When moneys shall have been so paid to the State Treasurer, he shall apply the same to their specified purpose as hereinafter directed.

SECTION 6. At the time of each annual meeting of the State * Board of Equalization hereafter, the Industrial Commission shall deliver to said Board an exact written statement of all bonds issued under the provisions of this Act outstanding at that time, including therein the dates of maturity, interest rates and all other information proper to enable the Board intelligently to comply with the provisions of this Act in regard to tax levies. On the basis of such information the State Board of Equalization shall annually

151 levy a tax, at the time other taxes are levied, sufficient
 in amount to pay such interest on said bonds as will
 become due during the year beginning on the next en-
 suing first day of January, and said tax shall be col-
 lected in the same manner as other state taxes are
 collected. In determining, however, the amount of
 152 the tax sufficient for such purpose the Board of Equal-
 153 ization shall take into account whatever moneys, if
 any, shall then have been paid to the State Treasurer
 by the Industrial Commission, as provided by Section
 5 of this Act, for the specific purpose of paying such
 interest. The Board of Equalization shall apply to
 the State Treasurer for information as to the amount
 154 of such moneys and he shall forthwith supply the in-
 155 formation requested. If the amount of such moneys
 shall equal or exceed the amount of the interest on said
 bonds payable during said year beginning on the next
 ensuing first day of January, then no tax shall be
 levied by the Board of Equalization for that purpose;
 but if the amount of such moneys shall be less than the
 156 amount of the interest on said bonds payable during
 157 said year, then the Board of Equalization shall deduct
 the amount of said moneys in the possession of the
 Treasurer from the amount of the interest so payable,
 and shall levy the tax hereinbefore in this section pro-
 158 vided for at least the difference between said amounts.

SECTION 7. Whenever it shall appear to the
 Board of Equalization from the information contained

in any statement *delivered to it by the Industrial Commission at any annual meeting of said Board, as provided in Section 6, above, that there will mature, within a period of five years, from such annual meeting, any of the bonds provided for in this Act, the Board of Equalization shall thereupon, at such annual meeting levy a tax in an amount equal to one-fifth of the amount of the principal of such bonds; provided, however, that in determining the amount of such tax, the Board of Equalization shall take into account whatever moneys, if any, shall have been paid to the State Treasurer by the Industrial Commission for the specific purpose of paying the principal of said bonds when due, as provided in section 5 of this Act. The Board of Equalization shall apply to the State Treasurer for information as to the amount of such moneys and as to the times when paid to him. If the amount of such moneys paid to the Treasurer since the date of the last preceding tax levy made by the Board of Equalization shall equal or exceed one-fifth of the amount of the bonds so to mature, then such tax shall not be levied; but if the amount of such moneys paid to the State Treasurer since the date of the last preceding tax levy shall be less than one-fifth of the amount of said bonds so to mature, then the Board of Equalization shall deduct the amount of such moneys, so paid, from such one-fifth of said bonds, and shall levy the tax, hereinbefore in this section provided, for the difference.

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165 It is the intention of this Section to provide that in
 each of the last five years, before the maturity of any
 said bonds, a state tax shall be levied which, together
 with such moneys as shall during the next preceding
 year have been paid to the State Treasurer, by the
 Industrial Commission for the purpose, shall be at
 166 least sufficient to pay one-fifth part of the principal
 of said bonds.

SECTION 8. To identify and distinguish the
 funds provided and available for the payment of the
 bonds issued pursuant to * this Act, there is hereby
 created and established, as a part of the moneys of
 the State received and kept by the State Treasurer,
 167 a fund to be designated the "Bank Bond Payment
 Fund." All moneys received by the State Treasurer,
 whether from the proceeds of taxes, or from pay-
 ments made by the Industrial Commission, or from
 legislative appropriation, or otherwise, which shall be
 by law or by other authoritative designation made ap-
 plicable to the payment of the said bonds, or interest
 168 thereon, shall be by him kept in said fund distinct
 from all other moneys, and shall be disbursed by him
 only for the particular purpose or purposes for which
 such moneys shall be delivered to him; and no other
 appropriation shall ever be made of the moneys in
 said fund until the said bonds shall be fully paid. But
 this Act shall not be construed as preventing the State
 Treasurer from depositing said funds in the Bank of

North Dakota, as provided by law with respect to all public funds. 16

SECTION 9. There is hereby appropriated, all of the moneys obtained as proceeds of the taxes provided for in sections 6 and 7 above, and all moneys paid to the State Treasurer by the Industrial Commission as specified in Section 5 above, and all moneys constituting the Bank Bond Payment Fund, or so much thereof as may be from time to time necessary, to pay the interest and principal upon the said bonds as payments thereon shall become due; and whenever any of said bonds or any coupons thereon, being due, shall be presented for payment, the State Treasurer shall pay the same out of the fund applicable thereto. If for any reason the said fund shall for the time being, be insufficient, the Treasurer shall supply the deficiency out of any other available moneys of the State in his custody; but in that case he shall as soon as possible, out of the Bank Bond Payment Fund, return the amount of such deficiency to the source whence taken. 170 171 172

SECTION 10. There is hereby appropriated out of the * general funds of the State, not otherwise appropriated, ten thousand dollars, or as much thereof as may be necessary to carry out the provisions of this Act. This appropriation is hereby made available immediately upon the passage and approval of this Act.

SECTION 11. This Act is hereby declared to

173 be an emergency measure and shall take effect and
be in force from and after its passage and approval;
and the provisions of sections 6, 7, 8 and 9 hereof
shall remain in full force and effect throughout the
period of thirty-six years from and after the passage
of this Act.

174 NORTH DAKOTA REAL ESTATE BOND ACT—
SENATE BILL NO. 130

AN ACT

175 Providing for the issuing of bonds of the State of
North Dakota in a sum not exceeding Ten Million
Dollars, to be known as "Bonds of North Dakota,
Real Estate Series"; prescribing the terms and stating
the purposes thereof; providing for a tax and making
other provisions for the payment thereof; making ap-
propriations and other provisions for the payment of
interest and principal on said bonds, and to carry into
effect the provisions of this Act; and declaring this
Act to be an emergency measure.

176 BE IT ENACTED BY THE LEGISLATIVE
ASSEMBLY OF THE STATE OF NORTH
DAKOTA:

SECTION 1. An issue of bonds of the State
of North Dakota, to be known as "Bonds of North
Dakota, Real Estate Series," is hereby authorized and
directed under the conditions and in the manner and
for the purposes hereinafter set forth.

SECTION 2. Whenever first mortgages upon 177

real estate, such as are authorized by the Act entitled
 "An Act declaring the purpose of the State of North
 Dakota to engage in the banking business and estab-
 (33) lishing a system of banking under the name of * the
 Bank of North Dakota, operated by the State, and
 defining the scope and manner of its operation, and
 the powers and duties of the persons charged with its 178
 management; making an appropriation therefor; and
 providing penalties for the violation of certain provi-
 sions thereof," enacted in the year 1919 by the Six-
 teenth Session of the Legislative Assembly of North
 Dakota, being House Bill No. 18, hereinafter called
 the Bank Act, shall be held by the Bank of North 179
 Dakota, securing a total amount of unpaid mortgage
 loans in the sum of at least one hundred thousand dol-
 lars, the Industrial Commission may cause such mort-
 gages, or such of them as it shall think proper but
 not less than in the total amount of one hundred thou-
 sand dollars, to be assigned, together with the obliga-
 tions thereby secured, to the State Treasurer. The 180
 assignment of each such mortgage and obligation shall
 be executed by the Manager of the Bank and shall re-
 cite that it is made to "The State Treasurer of North
 Dakota and his successors in office in trust as security
 for bonds to be issued by the State of North Dakota
 under the designation of Bonds of North Dakota, Real
 Estate Series, as provided by law"; and it shall be duly

181 recorded by said Manager in each county in which the
lands affected by the mortgage are situated. As soon
as such assignments are recorded, they, with the in-
struments assigned, shall be delivered to the State
Treasurer, and at the same time the Manager of the
Bank shall deliver to the State Treasurer, a verified
statement showing the amount of the loan remaining
182 unpaid on each such obligation secured by the mor-
gages so assigned and delivered.

SECTION 3. As soon as the State Treasurer
shall receive said instruments, he shall notify the Gov-
ernor, the State Auditor and the Secretary of State,
who shall each immediately inspect them. Thereupon
183 the State Treasurer shall immediately prepare for is-
sue, and the Governor and the State Treasurer shall
thereafter issue, negotiable bonds of the State * of (34)
North Dakota in an amount not exceeding the amount
of the outstanding loans secured by the mortgages
delivered to and in the possession of the State Treas-
urer, as above provided. Each of the bonds so issued
184 shall contain a recital that it is issued and that it is
secured by real estate first mortgages deposited with
the State Treasurer of North Dakota, in pursuance of
the provisions of this Act, which may be cited as the
"Real Estate Bond Act of North Dakota." Said bonds
shall be executed by the Governor and the State Treas-
urer under the great seal of the State and shall be
attested by the Secretary of State. The Auditor and

Secretary of State shall endorse and sign on each such
bond, when issued, a certificate showing that it is
issued pursuant to law and it within the debt limit.
The bonds so issued shall be designated "Bonds of
North Dakota, Real Estate Series."

SECTION 4. The bonds so issued shall be payable
to the purchaser or bearer; provided, however,
that the provisions of section 151, Compiled Laws of
1913, are hereby declared to apply to them. They
shall be issued in denominations of from five dollars
to ten thousand dollars, and shall be payable in not
less than ten or more than thirty years from the pas-
sage of this Act; provided, however, that at the option
of the Industrial Commission they shall be payable
at any time after five years from the date of their
issue, upon public notice given by the Industrial Com-
mission that they shall mature and become payable at
a date not less than one year from the time of the
giving of such public notice. They shall bear interest
at a rate not exceeding six per cent per annum from
their date until maturity, payable semi-annually on the
first day of January and of July in each year; and
coupons shall be attached to each bond, evidencing the
amount of interest payable at each first day of Janu-
ary and July until maturity. Principal and interest
shall be payable at the office of the State Treasurer
in Bismarck. * The terms of said bonds, as to values of
denominations, periods of maturity and rates of in-

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189 interest, shall be fixed by the commission in its sound
judgment, within the limitations above stated. Every
such bond and coupon must be presented for payment
at the office of the State Treasurer within six years
from the date of its maturity; and no such bond or
coupon shall bear interest after maturity unless pay-
190 ment thereof shall not be made upon due presentation
for payment.

SECTION 5. The said issue of bonds is auth-
orized for the purpose of making delivery thereof to
the Industrial Commission of North Dakota, as here-
inafter provided, to the end that the said Commission
may, by negotiation and sale of said bonds, procure
191 necessary funds for the Bank of North Dakota, thus
replacing in said Bank the funds employed by it from
time to time in making loans upon first mortgages of
real estate.

SECTION 6. In furtherance of the purpose
declared by this Act, it is hereby made the duty of the
Governor and the State Treasurer after the issue, ex-
192 ecution, sealing and attestation of said bonds, to de-
liver them to the Industrial Commission, in such de-
nominations and amounts, bearing interest at such
rates, and running to such period of maturity, as may
be required by the Commission, within the limitations
hereinbefore stated. The Industrial Commission is
empowered, authorized and directed, in connection
with and in addition to its other powers and duties, to

act as the agent of the state for the negotiation, sale
 and delivery of said bonds. It shall sell them at not
 less than par value for cash in such manner and at
 such times as in its sound discretion it shall deem most
 advantageous to the interests of the State. The Com-
 mission is hereby authorized to receive all moneys paid
 by buyers of said bonds, upon the sale thereof, and
 upon receipt of the purchase price to deliver to each
 purchaser the bonds by him purchased. Upon such
 delivery of bonds so purchased and paid for, the faith
 and credit of * the State of North Dakota is pledged
 for the payment thereof, both principal and interest,
 to the lawful holder and owner thereof upon presen-
 tation for payment, according to law. The moneys
 so derived and received from the sale of said bonds
 shall be placed by the Industrial Commission in the
 funds of the Bank. Nothing in this Act, however,
 shall be construed to prevent the purchase of any said
 bonds with any funds in the Bank of North Dakota.

SECTION 7. After such assignment of any
 mortgage, and the obligation thereby secured, all pay-
 ments accruing thereon shall be made to the State
 Treasurer. He shall hold and use said mortgages,
 obligations and the moneys paid thereon, in trust, first,
 for the security and payment of the bonds to be issued
 as herein provided, and second, for redelivery to the
 bank of such remaining part or balance thereof as
 may come within the provisions hereinafter stated.

197 He shall keep said moneys in a separate fund designated the "Real Estate Bond Payment Fund," apart from all other funds in his possession; and the provisions of section 7 of the Bank Act shall not apply thereto. He shall also keep in said fund, as a part thereof, for the same purpose and in the same manner and under the same conditions, all moneys received by him, whether from the proceeds of taxes, or from payments made by the Industrial Commission, or from legislative appropriation, or otherwise, which shall be by law or by other authoritative designation made applicable to the payment of the said bonds, or interest thereon. No other disposition, by appropriation or otherwise, shall ever be made of the moneys in said funds until said bonds shall be fully paid, or until the time limit by law for the payment thereof shall have expired; provided, however, that if any of said bonds issued and delivered to the Industrial Commission, as hereinbefore provided, shall be returned to the State Treasurer, not sold, then such returned bonds shall be deemed a part of the bond issue secured by such fund.

* SECTION 8 The State Treasurer shall pay the interest on said bonds upon presentment to him of the coupons for such interest when due and shall redeem said bonds upon their maturity by paying the principal thereof, all such payments being made from the Real Estate Bond Payment Fund, without auditor's

warrant. Each payment so made, in addition to other
 accounting as provided by law, shall be reported to
 the Bank of North Dakota. All moneys in said fund,
 or as much thereof as may be necessary are hereby ap-
 propriated for the payment of the interest and the
 principal of said bonds, and this appropriation shall
 not be repealed and no provision made in this Act for
 the payment of said bonds and interest, shall be dis-
 continued until the debt evidenced by said bonds, both
 principal and interest shall have been paid.

SECTION 9. If the obligation secured by any
 such mortgage so assigned to the State Treasurer shall
 not be performed according to its terms by the mort-
 gagor, by payment or otherwise, or if any condition
 expressed in any such mortgage shall not be duly per-
 formed and kept according to its terms, the State
 Treasurer shall proceed to exercise the rights con-
 ferred upon him as the assignee of said mortgage,
 through the enforcements of its terms by foreclosure
 or otherwise, for realizing upon or protecting the se-
 curity afforded by said mortgage or for collecting the
 amount of the obligation thereby secured. If in so
 doing it shall become necessary for the State Treasur-
 er to purchase the property mortgaged, he shall take
 title thereof as State Treasurer, and as Trustee, in
 trust for the security for payment of said bonds; and
 if title to any such mortgaged lands shall be perfected
 in any State Treasurer by virtue of said purchase, he

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205 shall apply to the District Court of the county in which
such lands are situated for direction as to the further
performance of the duties of his trust in the premi-
ses. The cash proceeds derived from the possession,
use * or sale of any such lands shall become a part of (30
the said Real Estate Bond Payment Fund.

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206 SECTION 10. If while any mortgage so as-
signed to the State Treasurer is in his hands, the note
or obligation thereby secured shall have been fully paid
according to its terms, the State Treasurer shall im-
mediately so certify to the Manager of the Bank. The
State Treasurer shall also give information to the
Bank as to any proceedings which he may from time
to time take respecting the enforcement and collec-
tion of the securities so assigned to him, not paid ac-
cording to their terms.

208 SECTION 11. The State Treasurer shall from
time to time, at the request of the Bank of North Da-
kota, give information as to the amount of cash bal-
ances in his hands credited to said Real Estate Bond
Payment Fund. If such balances shall include funds
received by him upon the payment of the principal
sum loaned upon any such mortgage, the bank may,
to the extent of such principal sums so paid, substi-
tute therefor new mortgages by assignment thereof,
together with the obligation thereby secured, in the
same manner and to the same effect as in the case of
the mortgages and obligations originally assigned as

the basis of the issue of such bonds, and upon such assignment and substitution of such new mortgages, the State Treasurer shall pay to the Bank the amount thereof, and such mortgages so substituted shall become and continue a part of the body of said trust, the same as the mortgages and obligations originally assigned to the State Treasurer therefor; provided, however, that unless the amount of the mortgages in such fund falling due before bonds secured thereby is sufficient to pay such bonds, the Treasurer shall reserve sufficient cash for that purpose.

SECTION 12. All said bonds shall be exempt from state, county and municipal taxes of any and all kinds.

* SECTION 13. If at the time of the annual meeting of the State Board of Equalization, the moneys in the Real Estate Bond Payment Fund shall appear to the State Treasurer to be insufficient to meet the payments of interest or principal upon said bonds accruing within a period of one year thereafter, he shall so inform the State Board of Equalization, which shall thereupon proceed to include in the annual tax levy, such tax as in its judgment shall be necessary to meet the indicated deficiency, and the proceeds of such tax shall be placed by the State Treasurer in said fund.

SECTION 14. Whenever it shall appear that there are in said Real Estate Bond Payment Fund, funds which, with the mortgage securities on hand are

213 more than sufficient to provide for the payment of all
bonds and interest thereon outstanding, the excess of
such funds requisite for that purpose shall be paid by
the State Treasurer to the Bank of North Dakota, if
so directed by the Industrial Commission.

214 SECTION 15. The powers herein granted may
be repeatedly exercised and the duties following there-
upon shall be likewise repeatedly performed from
time to time as occasion may arise under the terms of
this Act; provided, however, that at no time shall the
amount of bonds issued and outstanding pursuant to
the terms of this Act exceed the total of ten million
dollars.

215 SECTION 16. There is hereby appropriated
out of the general funds of the State, not otherwise
appropriated, ten thousand dollars or as much thereof
as may be necessary, to carry out the provisions of
this Act. This appropriation is hereby declared to be
immediately available upon the passage and approval
of this Act.

216 SECTION 17. This Act is hereby declared to
be an emergency measure, and shall take effect and
be in force from and after its passage and approval.

*MILL AND ELEVATOR ASSOCIATION ACT—
SENATE BILL NO. 20
AN ACT

Declaring the purpose of the State of North Dakota
to engage in the business of manufacturing and mar-

keting of farm products, and for establishing a warehouse, elevator and flour mill system under the name of North Dakota Mill and Elevator Association operated by the State, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management; and making an appropriation therefor.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF NORTH DAKOTA:

SECTION 1. That for the purpose of encouraging and promoting agriculture, commerce and industry, the State of North Dakota shall engage in the business of manufacturing and marketing farm products and for that purpose shall establish a system of warehouses, elevators, flour mills, factories, plants, machinery and equipments, owned, controlled and operated by it under the name of North Dakota Mill and Elevator Association, hereinafter for convenience called the Association.

SECTION 2. The Industrial Commission shall operate, manage, and control the Association, locate and maintain its places of business, of which the principal place shall be within the state, and shall make and enforce orders, rules, regulations and by-laws for the transaction of its business. The business of the Association, in addition to other matters herein specified, may include anything that any private individual

221 or corporation may lawfully do in conducting a similar
 222 business except as herein restricted. The Industrial
 Commission shall meet within twenty days after
 the passage and approval of this Act to begin the or-
 ganization of the Association.

SECTION 3. To accomplish the purposes of
 223 this act, the Industrial Commission shall acquire by
 purchase, lease, or by exercise of right of eminent
 domain, as provided by Chapter 36 * of the Code of (4)
 Civil Procedure, Compiled Laws of 1913, all neces-
 sary property or property rights, and may construct,
 remodel or repair all necessary buildings; and may
 224 purchase, lease, construct, or otherwise acquire, ware-
 225 houses, elevators, flour mills, factories, offices, plants,
 machinery, equipments, and all other things necessary,
 incidental or convenient in the manufacturing and mar-
 keting of all kinds of raw and finished farm products
 within or without the state and may dispose of the
 same; and may buy, manufacture, store, mortgage,
 pledge, sell, exchange or otherwise acquire or dispose
 of all kinds of manufactured and raw farm and food
 products and by-products, and may for such purposes
 establish and operate exchanges, bureaus, markets and
 agencies, within or without the State, including for-
 eign countries, on such terms and conditions, and
 under such rules and regulations as the Commission
 may determine.

SECTION 4. The Industrial Commission shall

obtain such assistance as in its judgment may be necessary for the establishment, maintenance and operation of the Association. To that end it shall appoint a manager, and may appoint such subordinate officers and employees as it may judge expedient. It may constitute such manager its general agent in respect to the functions of the association, but subject, nevertheless, in such agency, to the supervisions, limitation and control of the Commission. It shall employ such contractors, architects, builders, attorneys, clerks, accountants, and other experts, agents and servants as in the judgment of the Commission the interests of the state may require, and shall define the duties, designate the titles, and fix the compensation and bonds of all such persons so engaged; provided, however, that subject to the control and regulation of the Commission, the Manager of the Association shall appoint and employ such deputies and other subordinates, and such contractors, architects, builders, attorneys, clerks, accountants and other experts, agents and servants as he shall, in his judgment, deem are required * by the interests of the Association. The total compensation of such appointees and employees, together with other expenditures for the operation and maintenance of the Association, shall remain within the appropriation and earnings lawfully available in each year for such purpose. All officers and employees of the Association engaged upon its financial functions shall, before

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229 entering upon their duties, respectively furnish good
and sufficient bonds to the state in such amount and
upon such conditions as the commission may require
and approve; but the bond of the Manager shall not
be less than fifty thousand dollars. Such bonds shall
be filed with the Secretary of State.

230 SECTION 5. The Industrial Commission may
remove and discharge any and all persons appointed
in the exercise of the powers granted by this Act,
whether by the Commission or by the Manager of the
association, and any such removal may be made when-
ever in the judgment of the Commission the public
interests require it; provided, however, that all ap-
231 pointments and removals contemplated by this Act
shall be so made as the Commission shall deem most
fit to promote the efficiency of the public service.

232 SECTION 6. The Industrial Commission shall
fix the buying price of all things bought, and the sell-
ing price of all things sold, incidental to the operation
of the Association, and shall fix all charges for any
and all services rendered by the Association; but in
fixing these prices—while all services are to be ren-
dered as near as may be at cost—there shall be taken
into consideration in addition to other necessary costs,
a reasonable charge for depreciation of all property,
all overhead expenses and a reasonable surplus, to-
gether with all amounts required for the repayment,
with interest, of funds received from the State.

SECTION 7. All business of the Association

may be conducted under the name of "North Dakota
 (43) Mill and Elevator Association." * Title to property
 pertaining to the operation of the Association may be
 obtained and conveyed in the name of "The State of
 North Dakota, doing business as the North Dakota
 Mill and Elevator Association." Written instruments
 shall be executed in the name of the State of North
 Dakota, signed by any two members of the Industrial
 Commission, of whom the Governor shall be one, or
 by the manager of the Association, within the scope
 of his authority so to do as defined by the Industrial
 Commission.

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SECTION 8. Civil actions may be brought
 against the State of North Dakota on account of
 causes of action claimed to have arisen out of trans-
 actions connected with the operation of the association
 upon condition that the provisions of this section are
 complied with. In such actions the State shall be
 designated as "The State of North Dakota, doing busi-
 ness as North Dakota Mill and Elevator Associa-
 tion," and the service of process therein shall be made
 upon the manager of the association. Such actions
 may be brought in the same manner and shall be sub-
 ject to the same provisions of law as other civil actions
 brought pursuant to the provisions of the Code of
 Civil Procedure. Such actions shall be brought, how-
 ever, in the county where the Association shall have

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237 its principal place of business, except as provided in Sections 7405, 7416 and 7418, Compiled Laws of North Dakota, 1913. The provisions of sections 375 and 657 of the Compiled Laws of 1913 shall not apply to claims against the State, affected by the provisions of this section.

238 SECTION 9. There is hereby appropriated, to carry out the purposes of this act, all moneys raised by the mill tax for terminal elevators as provided in sections 2072 and 2073 of the Compiled Laws of 1913. Said moneys shall be paid to the Manager of said Association, and he shall place the said moneys in the general funds of the Association. Said money, to-
239 gether with any funds that shall be procured by the Industrial Commission through the sale of state bonds, as may be provided by law for that purpose, shall be designated as the capital of the Association.

* SECTION 10. The State Examiner shall per- (44)
sonally or through deputy examiners visit the Associa-
tion at least twice annually, and shall inspect and veri-
240 fy the assets in its possession and under its control, with sufficient thoroughness of investigation to ascertain with reasonable certainty whether the valuations are correctly carried on its books. He shall report the results of such examination and investigation to the Industrial Commission as soon as practicable, and to the Legislative Assembly at its next ensuing session.

SECTION 11. This Act is hereby declared to
be an emergency measure, and shall take effect and
be in force from and after its passage and approval.

MILL AND ELEVATOR ASSOCIATION BOND
ACT—SENATE BILL NO. 75

AN ACT

Providing for the issuing of bonds of the State of
North Dakota in a sum not exceeding Five Million
Dollars to be known as "Bonds of North Dakota,
Mill and Elevator Series"; prescribing the terms and
stating the purposes thereof; providing for a tax and
making other provisions for the payment thereof;
making appropriations and other provisions for the
payment of interest and principal of said bonds and
to carry into effect the provisions of this Act; and
declaring this Act to be an emergency measure.

BE IT ENACTED BY THE LEGISLATIVE
ASSEMBLY OF THE STATE OF NORTH
DAKOTA:

SECTION 1. The issuance of bonds of the
State of North Dakota, to be known as "Bonds of
North Dakota, Mill and Elevator Series," is hereby
authorized and directed, under the conditions and in
the manner and for the purposes hereinafter set forth.

SECTION 2. Whenever the Industrial Com-
mission shall deem it expedient so to do, for the pur-
pose of authorizing the issuance of bonds of the State

245 of North Dakota as contemplated by this * Act, it shall (4
 cause mortgages to be executed in the manner pres-
 246 scribed by Section 7 of the Act entitled "An Act de-
 claring the purpose of the State of North Dakota to
 engage in the business of manufacturing and market-
 ing of farm products, and for establishing a ware-
 house, elevator and flour mill system under the name
 of North Dakota Mill and Elevator Association oper-
 ated by the State, and defining the scope and manner
 of its operation, and the powers and duties of the
 persons charged with its management; and making
 an appropriation therefor," enacted in the year 1919
 247 by the Sixteenth Session of the Legislative Assembly
 of North Dakota, being Senate Bill No. 20. The
 grantee and mortgagee designated in said mortgages
 shall be "The State Treasurer of North Dakota and
 his successors in office in trust." Each mortgage shall
 be executed and delivered to the Treasurer of North
 Dakota and his successors in office, in trust as security
 for bonds to be issued by the State of North Dakota
 248 under the designation of "Bonds of North Dakota,
 Mill and Elevator Series," as provided by law, and
 shall contain a recital to that effect. The property
 described in and covered by said mortgages shall be
 such property as is owned by or may be acquired for
 the State of North Dakota, doing business as North
 Dakota Mill and Elevator Association, and dedicated
 to or acquired for the use thereof by the Industrial

Commission. All property dedicated to or acquired 249
 for the State of North Dakota doing business as North
 Dakota Mill and Elevator Association shall be de-
 scribed in and covered by first mortgages so that at
 all times all of the property of the State of North
 Dakota doing business as North Dakota Mill and
 Elevator Association shall be pledged to the payment 250
 of all of the bonds issued, sold, and delivered under
 the provisions of this Act and attached to each of said
 mortgages, and incorporated by reference into the pro-
 visions thereof, shall be an itemized statement of all
 (46) of the property specified and covered therein, * show-
 ing the true value of each item thereof based upon
 appraisal made under the direction of the Industrial 251
 Commission and verified by the oath of the appraisers.
 Said mortgages shall be a first lien upon all of said
 property without prior lien or incumbrance of any
 kind whatsoever.

SECTION 3. Said mortgages shall be duly re-
 corded in each county in which the property affected
 thereby is situated. As soon as such mortgages are 252
 recorded they shall be delivered to the State Treas-
 urer, and be retained by the State Treasurer and his
 successors in office in trust until all of the bonds se-
 cured thereby as provided by this Act shall be paid.

SECTION 4. As soon as the State Treasurer
 shall receive such mortgages so recorded he shall noti-
 fy the Governor, the State Auditor and the Secretary

253 of State, who shall thereupon immediately inspect
them, and upon ascertaining from such examination
and inspection that said mortgages have been properly
executed and duly recorded, it shall be the duty of the
State Treasurer to immediately prepare for issue, and
the Governor and State Treasurer shall thereafter is-
254 sue, negotiable bonds of the State of North Dakota
in an amount not exceeding the value of the property
included within the terms of said mortgages as ex-
pressed in the itemized statements and valuation at-
tached to said mortgages, as provided in Section 2 of
this Act. Each of the bonds so issued shall contain a
recital that it is secured by first mortgages deposited
255 with the State Treasurer of North Dakota upon prop-
erty of the State, dedicated to the use of the North
Dakota Mill and Elevator Association; that it is issued
in pursuance of the provisions of this Act, which may
be cited as the "Mill and Elevator Bond Act of North
Dakota." Said bonds shall be executed by the Gov-
ernor and the State Treasurer under the great seal
256 of the State, and shall be attested by the Secretary of
State. The Auditor and Secretary of State shall en-
dorse and sign on each such bond, when issued, a
certificate showing that it has * been issued pursuant to (4)
law and is within the debt limit. The bonds so issued
shall be designated "Bonds of North Dakota. Mill and
Elevator Series," and may be issued in series from
time to time as the Industrial Commission may by
order designate and require.

SECTION 5. The bonds so issued shall be payable to the purchaser or bearer; provided, however, that the provisions of Section 151, Compiled Laws of 1913, are hereby declared to apply to them. They shall be issued in denominations of from five dollars to ten thousand dollars, and shall be payable in not less than ten or more than thirty years from the passage of this Act. They shall bear interest at a rate not exceeding six per cent per annum from their date until maturity, payable semi-annually on the first day of January and of July in each year; and coupons shall be attached to each bond, evidencing the amount of interest payable at each first day of January and July until maturity. Principal and interest shall be payable at the office of the State Treasurer in Bismarck. The terms of said bonds, as to values or denominations, and rates of interest, shall be fixed by the Commission in its sound judgment, within the limitations above stated. Every such bond and coupon must be presented for payment at the office of the State Treasurer within six years from the date of its maturity; and no such bond or coupon shall bear interest after maturity unless payment thereof shall not be made upon due presentation for payment.

SECTION 6. The said bonds so issued shall be delivered to the Industrial Commission of North Dakota to the end that the said Commission may by negotiation and sale of said bonds procure necessary funds for the operation of said association.

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SECTION 7. In furtherance of the purpose declared by this Act, it is hereby made the duty of the Governor and the State Treasurer after the issue, execution, sealing and attestation * of said bonds to deliver them to the Industrial Commission, in such denominations and amounts, bearing interest at such rates, and running to such period of maturity, as may be required by the Commission, within the limitations herein stated. The Industrial Commission is empowered, authorized and directed in connection with and in addition to its other powers and duties, to act as the agent of the state for the negotiation, sale and delivery of said bonds. It shall sell them for cash at not less than par value in such manner and at such times in its sound discretion it shall deem most advantageous to the interests of the state. The Commission is hereby authorized to receive all moneys paid by buyers of said bonds, upon the sale thereof, and upon receipt of the purchase price to deliver to each purchaser the bonds by him purchased. Upon such delivery of bonds so purchased and paid for, the faith and credit of the State of North Dakota is pledged for the payment thereof, both principal and interest, to the lawful holder and owner thereof upon presentation for payment, according to law. The moneys so derived and received from the sale of said bonds shall be placed by the Industrial Commission in the funds of the Association. Nothing in this Act, how-

ever, shall be construed to prevent the purchase of
any said bonds with any funds in the Bank of North
Dakota. 265

SECTION 8. The State Treasurer and his successors in office shall hold such mortgages, first, for the security and payment of the bonds issued as provided in this Act, and second for the satisfaction and cancellation thereof, and re-delivery to the Industrial Commission, if and when said bonds have been fully paid. 266

SECTION 9. From time to time the Industrial Commission shall, out of the earnings derived from the operation of the Association, pay to the State Treasurer such moneys as the Commission shall deem available to devote to the purpose of paying said bonds and interest. In making such payment the * Commission shall file a statement with the State Treasurer specifying the purpose of such payment. When moneys shall have been so paid to the State Treasurer, he shall apply the same to their specified purpose as hereinafter directed. 267

SECTION 10. At the time of each annual meeting of the State Board of Equalization hereafter, the Industrial Commission shall deliver to said Board an exact written statement of all bonds issued under the provisions of this Act outstanding at that time, including therein the dates of maturity, interest rates and all other information proper to enable the board 268

269 intelligently to comply with the provisions of this act
in regard to tax levies. On the basis of such infor-
mation, the State Board of Equalization shall annual-
ly levy a tax, at the time other taxes are levied, suf-
ficient in amount to pay such interest on said bonds
as will become due during the year beginning on the
270 next ensuing first day of January, and said tax shall
be collected in the same manner as other state taxes
are collected. In determining, however, the amount
of the tax sufficient for such purpose the Board of
Equalization shall take into account whatever moneys,
if any, shall then have been paid to the State Treas-
urer by the Industrial Commission, as provided in this
271 Act, for the specific purpose of paying such interest.
The Board of Equalization shall apply to the State
Treasurer for information as to the amount of such
moneys, and he shall forthwith supply the informa-
tion requested. If the amount of such moneys shall
equal or exceed the amount of the interest on said
bonds payable during said year beginning on the next
272 ensuing first day of January, then no tax shall be
levied by the Board of Equalization for that purpose;
but if the amount of such moneys shall be less than
the amount of the interest on said bonds payable dur-
ing said year, then the Board of Equalization shall
deduct the amount of said moneys in the possession
of the treasurer * from the amount of the interest so (50)
payable, and shall levy the tax hereinbefore in this

section provided for at least the difference between
said amounts. 273

SECTION 11. Whenever it shall appear to the Board of Equalization from the information contained in any statement delivered to it by the Industrial Commission at an annual meeting of said Board, as provided in Section 10 above that there will mature, within a period of five years from such annual meeting, any of the bonds provided for in this Act, the Board of Equalization shall thereupon, at such annual meeting, levy a tax in an amount equal to one-fifth of the amount of the principal of such bonds; provided, however, that in determining the amount of such tax, the Board of Equalization shall take into account whatever moneys, if any, shall have been paid to the State Treasurer by the Industrial Commission for the specific purpose of paying the principal of said bonds when due, as provided in Section 9 of this Act. The Board of Equalization shall apply to the State Treasurer for information as to the amount of such moneys and as to the times when paid to him. If the amount of such moneys paid to the Treasurer since the date of the last preceding tax levy made by the Board of Equalization shall equal or exceed one-fifth of the amount of the bonds so to mature, then such tax shall not be levied; but if the amount of such moneys, paid to the State Treasurer since the date of the last preceding tax levy, shall be less than one-fifth of the 274 275 276

277 amount of said bonds so to mature, then the Board of
 Equalization shall deduct the amount of such moneys,
 so paid, from such one-fifth of said bonds, and shall
 levy the tax, hereinbefore in this section provided, for
 the difference. It is the intention of this section to
 provide that in each of the last five years, before the
 maturity of any of said bonds, a state tax shall be
 278 levied which, together with such moneys as shall dur-
 ing the next preceding year have been paid to the
 State Treasurer by the Industrial Commission for the
 * purpose, shall be at least sufficient to pay one-fifth (51)
 part of the principal of said bonds.

SECTION 12. To identify and distinguish the
 279 funds provided and available for the payment of the
 bonds issued pursuant to this Act, there is hereby
 created and established as a part of the moneys of the
 state received and kept by the State Treasurer, a fund
 to be designated the "Mill and Elevator Bond Pay-
 ment Fund." All moneys received by the State Treas-
 urer whether from the proceeds of taxes, or from
 280 payments made by the Industrial Commission, or from
 legislative appropriation, or otherwise, which shall be
 by law or by other authoritative designation made ap-
 plicable to the payment of the said bonds, or interest
 thereon, shall be by him kept in said fund distinct
 from all other moneys, and shall be disbursed by him
 only for the particular purpose or purposes for which
 such moneys shall be delivered to him; and no other

appropriation shall ever be made of the moneys in said fund until the said bonds shall be fully paid. But this act shall not be construed as preventing the State Treasurer from depositing said funds in the Bank of North Dakota, as provided by law with respect to all public funds. 281

SECTION 13. There is hereby appropriated, all of the moneys obtained as proceeds of the taxes provided for in sections 10 and 11 above, and all moneys paid to the State Treasurer by the Industrial Commission as specified in Section 9 above, and all moneys constituting the Mill and Elevator Bond Payment Fund, or so much thereof as may be from time to time necessary, to pay the interest and principal upon the said bonds as payments thereon shall become due; and whenever any of said bonds, or any coupons thereon, being due, shall be presented for payment, the State Treasurer shall pay the same out of the fund applicable thereto. If for any reason the said fund shall, for the time being, be insufficient, the Treasurer shall supply * the deficiency out of any other available moneys of the state in his custody; but in that case he shall as soon as possible, out of the Mill and Elevator Bond Payment Fund, return the amount of such deficiency to the source whence taken. 282 283 284

SECTION 14. The State Treasurer shall pay the interest on said bonds upon presentation to him of the coupons for such interest when due, and shall re-

285 deem said bonds upon their maturity by paying the
principal thereof, all such payments being made from
the Mill and Elevator Bond Payment Fund, without
auditor's warrant. Each payment so made, in addi-
tion to other accounting as provided by law, shall be
reported to the said Association. All moneys in said
286 fund, or as much thereof as may be necessary, are
hereby appropriated for the payment of the interest
and the principal of said bonds, and this appropria-
tion shall not be repealed, and no provisions made in
this Act for the payment of said bonds and interest
shall be discontinued until the debt evidenced by said
bonds, both principal and interest, shall have been paid.

287 SECTION 15. The powers herein granted may
be repeatedly exercised and the duties following there-
upon shall be likewise repeatedly performed from time
to time as occasion may arise under the terms of this
act; provided, however, that at no time shall the
amount of bonds issued and outstanding pursuant to
the terms of this act, exceed the total of Five Million
288 Dollars.

SECTION 16. All said bonds shall be exempt
from state, county and municipal taxes of any and all
kinds.

SECTION 17. There is hereby appropriated
out of the general funds of the state, not otherwise
appropriated, ten thousand dollars, or as much thereof
as may be necessary, to carry out the provisions of this

Act. This appropriation is hereby declared to be immediately available upon the passage and approval of this Act. 288

3) * SECTION 18. This Act is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval.

HOME BUILDING ACT—SENATE BILL NO 19. 290

AN ACT

Declaring the purpose of the State of North Dakota to engage in the enterprise of providing homes for residents of this state and to that end to establish a business system operated by the State under the name of The Home Building Association of North Dakota, and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; and making an appropriation therefor. 291

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF NORTH DAKOTA: 292

SECTION 1. For the purpose of promoting home building and ownership, the State of North Dakota shall engage in the enterprise of providing homes for residents of the State, and to that end it shall and does hereby, establish a business system operated by the State under the name of The Home Building Association of North Dakota, hereinafter for convenience called the Association.

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SECTION 2. The Industrial Commission of North Dakota shall operate, manage and control the Association and shall locate and maintain its places of business, of which the principal place shall be within the State, and shall make and enforce orders, rules, regulations and by-laws for the transaction of its business.

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SECTION 3. To accomplish the purposes of this Act the Industrial Commission shall acquire by purchase, lease or exercise of the right of eminent domain, as provided by Chapter 36 of the Code of Civil Procedure, Compiled Laws of 1913, all requisite property and property rights, and may construct, re-

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* pair and remodel buildings, having strict regard for (54) economy in the administration of its affairs.

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SECTION 4. The Industrial Commission shall obtain such assistance as in its judgment may be necessary for the establishment, maintenance and operation of the Association. To that end it shall appoint a Manager, and may appoint such subordinate officers and employees as it may judge expedient. It may constitute such Manager its general agent, in respect to the functions of the Association, but subject, nevertheless, in such agency, to the supervision, limitation and control of the Commission. It shall employ such contractors, architects, builders, attorneys, clerks, accountants and other experts, agents and servants as in the judgment of the Commission the interest of the

State may require, and shall define the duties, designate the title, and fix the compensation and bonds of all such persons so engaged; provided, however, that subject to the control and regulation of the Commission, the Manager of the Association shall appoint and employ such deputies and other subordinates, and such contractors, architects, builders, attorneys, clerks, accountants and other experts, agents and servants, as he shall in his judgment, deem are required by the interest of the Association. The total compensation of such appointees and employees, together with other expenditures for the operation and maintenance of the association shall remain within the appropriation and earnings lawfully available in each year for such purpose. All officers and employees of the Association engaged upon its financial functions shall, before entering upon their duties, respectively furnish good and sufficient bonds to the State in such amount and upon such conditions as the Commission may require and approve; but the bond of the Manager shall not be less than fifty thousand dollars. Such bonds shall be filed with the Secretary of State.

SECTION 5. The Industrial Commission may remove and discharge any and all persons appointed in the exercise of the powers granted by this act, whether by the Commission or by the * Manager of the Association, and any such removal may be made whenever in the judgment of the Commission the public

101 interests require it; provided, however, that all ap-
 102 pointments and removals contemplated by this Act
 shall be so made as the Commission shall deem most
 fit to promote the efficiency of the public service.

SECTION 6. Whenever funds shall be avail-
 able, derived from the sale of bonds issued by the
 State and delivered to the Industrial Commission for
 302 negotiation to carry on the business of the Associa-
 tion; or derived from appropriations made by the
 Legislative Assembly for such purpose; or derived
 from deposits received by the Association as herein-
 after provided, or derived from payments made for
 homes by purchasers thereof, such funds shall be used,
 303 under proper regulations of the Industrial Commis-
 sion, for investment in building or purchasing homes
 within the State for members of the Home Buyers'
 League, as such Leagues are hereinafter defined. No
 home shall be built, or purchased and sold, at a price
 to exceed five thousand dollars, except in case of a
 farm home, in which case the selling price shall not
 304 exceed ten thousand dollars. The word "home" as
 herein used, shall mean a dwelling house, within or
 adjacent to a town, village or city, together with such
 equipments as are customarily used in connection with
 a dwelling house. The words "farm home" as herein
 used, shall mean a tract of agricultural land together
 with a dwelling house, a barn, and such other farm
 buildings and equipments as are customarily used in
 connection with a farm home.

SECTION 7. The Association shall make a specialty of building standardized houses, barns and other buildings and equipments provided for herein. For its uses the Industrial Commission may acquire suitable tracts of land, by purchase or by exercise of the right of eminent domain, deemed by the Commission suitable to accomplish the purposes of this Act; and may subdivide such land into lots, and lay out streets, * sidewalks, parks and gardens therein, and build homes on said lots, as provided for herein, and supply them with water, light and heat.

SECTION 8. Any person may open a home buying account with the Association by applying in person, by mail or through a Home Buyers' League, a trade union, a woman's club or any other recognized industrial, social or civic body. Special efforts shall be made to secure deposits from children, young people, renters and wage earners in order that more people may own their own homes. Any such deposits, together with interest, may be withdrawn upon six months' notice.

SECTION 9. The Industrial Commission shall fix the rate of interest on all deposits and loans, and the charges for all services rendered by the Association, but no interest rate allowed or received shall exceed six per cent per annum.

SECTION 10. Ten or more depositors in the Association may form themselves into a local body to

309 be known as a Home Buyers' League. Every such
 Home Buyers' League must be authorized, registered
 and numbered in the office of the Association and it
 shall be governed by such rules and regulations as may
 be prescribed by the Industrial Commission. No per-
 son shall become a member of a Home Buyers' Lea-
 310 gue without the written consent of all the other mem-
 bers, which shall be filed and recorded in the office
 of the Association.

SECTION 11. Each Home Buyers' League
 shall elect a secretary-treasurer who shall perform the
 duties usual to such office, and shall be its executive
 officer. He shall also be the agent of the Association
 311 and shall perform such other duties as the Industrial
 Commission may prescribe.

SECTION 12. Whenever a member of a Home
 Buyers' League shall have deposited with the Asso-
 ciation a sum equal to twenty per cent of the total
 selling price of a home or farm home, the Association
 shall, upon his application purchase or build such
 312 home or farm home and convey it to him upon a cash
 payment of twenty per cent, the balance to be secured
 by a purchase money * mortgage on the property, and (57)
 to be paid on an amortization plan by means of a fixed
 number of monthly installments sufficient to cover, first,
 a charge on the loan at a rate to be determined by the
 Industrial Commission, second, a charge for admin-
 istration and surplus at a rate not exceeding one per

cent per annum on the unpaid principal, said two rates
 combined constituting the interest rate on the deferred payments; and, third, such amounts to be applied
 on the principal as will extinguish the debt within an
 agreed period, not less than ten or more than twenty
 years. Additional payments in sums of twenty-five
 dollars or any multiple thereof, for the reduction of
 the amount of the unpaid principal, or the payment of
 the entire principal, may be made on any regular installment date, under the rules and regulations of the
 Industrial Commission. In case of any accident, crop
 failure, or other event which reduces the buyers' reasonable income by one half, all payments under such
 contract may in the discretion of the Industrial Commission, be extended from time to time for a period
 of one year; provided, however, that on the payment
 of all installments such further annual payment shall
 be payable as will pay the interest with interest thereon, for the years for which no payments were made.

SECTION 13. Each member of every Home
 Buyers' League shall be jointly and severally liable
 for all contracts, debts, and obligations due the Association from his League, to the extent of fifteen per
 cent of the price at which his home was sold to him.

SECTION 14. All funds of the Association
 shall be deposited in the Bank of North Dakota, and
 disbursed through it.

SECTION 15. All business of the Association

317 may be conducted under the name of "The Home
 Building Association of North Dakota." Title to
 property pertaining to the operation of the Association
 shall be obtained and conveyed in the name of "The
 State of North Dakota, doing business as the Home
 Building Association of North Dakota." Written in-
 struments * shall be executed in the name of the State (50)
 318 of North Dakota, signed by any two members of the
 Industrial Commission, of whom the Governor shall
 be one, or by the Manager of the Association within
 the scope of his authority so to do as defined by the
 Industrial Commission.

SECTION 16. Civil actions may be brought
 319 against the State of North Dakota on account of
 causes of action claimed to have arisen out of trans-
 actions connected with the operation of the Associa-
 tion upon condition that the provisions of this Sec-
 tion are complied with. In such actions the State shall
 be designated as "The State of North Dakota, doing
 business as the Home Building Association," and the
 320 service of process therein shall be made upon the man-
 ager of the Association. Such actions may be brought
 in the same manner and shall be subject to the same
 provisions of law as other civil actions brought pur-
 suant to the provisions of the Code of Civil Proce-
 dure. Such actions shall be brought, however, in the
 county where the Association shall have its principal
 place of business, except as provided in sections 7415.

7416 and 7418, Compiled Laws of North Dakota, 321
 1913. The provisions of Section 375 and 657 of the
 Compiled Laws of 1913 shall not apply to claims
 against the State affected by the provisions of this
 Section.

SECTION 17. The State Examiner shall per-
 sonally or through deputy examiner visit the Asso- 322
 ciation at least twice annually, and shall inspect and
 verify the assets in its possession and under its con-
 trol, with sufficient thoroughness of investigation to
 ascertain with reasonable certainty whether the valua-
 tions are correctly carried on its books. He shall re-
 port the results of such examination and investigation
 to the Industrial Commission as soon as practicable, 323
 and to the Legislative Assembly at its next ensuing
 session.

SECTION 18. There is hereby appropriated
 out of the General Funds of the State, not otherwise
 appropriated, one hundred thousand dollars, or so
 much thereof as may be necessary, to carry out the
 provisions of this act. This appropriation * is hereby 324
 made available immediately upon the passage and ap-
 proval of this act. The Industrial Commission shall,
 out of the earnings of the Association make provision
 for accumulating a fund with which to replace in the
 general funds of the State, the amount received by the
 Commission under this appropriation, as may be di-
 rected by the Legislative Assembly.

That the amendments to sections 182 and 185 of the Constitution, hereinbefore set out, and the acts of the legislature set out in the preceding paragraph, purport and pretend to authorize the State of North Dakota to enter into private industries, enterprises, and business projects, such as general banking, buying, selling and handling grain, owning and operating elevators and flour mills, home building, and general real estate loan business, general merchandising, and other business of every character and description.

XIX.

That the defendants, Lynn J. Frazier, William Langer, and John N. Hagan, officers of the State of North Dakota as aforesaid, claiming to act under the provisions and authority of the said constitutional amendments and the Industrial Commission Act, hereinbefore set forth, have organized as, and now claim to be a lawfully organized body under the name of "The Industrial Commission of North Dakota." That said Commission and said persons acting and claiming to act as such Industrial Commission as aforesaid, unless enjoined and restrained by order and judgment of this court, will expend large sums of money of the State of North Dakota, being funds and moneys raised by taxation against the people and property of the State of North Dakota, to-wit: in excess of the sum of \$400,000.00 and that such expenditures have already

commenced and will continue until the appropriations available therefor have been expended. That such expenditures generally will be made on account of and for the following purposes:

That said Commission and the members thereof as aforesaid, have employed a secretary of the said commission at a salary of \$3600. per annum, and are threatening to, and will engage in and undertake all of the different enterprises and business projects specially provided for under the said acts of the legislature hereinbefore set forth, and have commenced the (61) * organization of the said special businesses so referred to in the acts of the legislature hereinbefore set forth, and will expend the full amount of the appropriation provided in said Industrial Commission Act, to-wit, more than the sum of \$200,000.00.

That the said Industrial Commission and the members thereof as aforesaid, have begun proceedings for the organization and development of the Bank of North Dakota, as provided for in the Bank of North Dakota Act, as hereinbefore set forth, and have employed a bank expert to assist in the further work of the organization and operation of said bank, at a salary of \$5000. per annum, and unless restrained and enjoined by this court, will continue in the establishment and operation of said bank without interruption until the full sum of the appropriation provided for in said act, to-wit, \$100,000.00, is fully expended.

333 That the said Industrial Commission and the
members thereof as aforesaid, unless restrained and
enjoined therefrom by the order and judgment of this
Court, will proceed immediately to carry out the pro-
visions of the Bank of North Dakota Bond Act, as
hereinbefore set forth, and in so carrying out said
334 provisions, will expend the full sum of the appropria-
tion provided for in said Act, to-wit, the sum of
\$10,000.00.

335 That the said Industrial Commission and the
members thereof as aforesaid, unless restrained and
enjoined therefrom by the order and judgment of this
Court, will proceed immediately to carry out the pro-
visions of the Bank of North Dakota Real Estate Bond
Act, as hereinbefore set forth, and in so carrying out
said provisions, will expend the full sum of the ap-
propriation provided for in said Act, to-wit, the sum of
\$10,000.00

336 That the said Industrial Commission and the
members thereof as aforesaid, unless restrained and
enjoined therefrom by the order and judgment of this
Court, will proceed * to establish a system of ware- (62)
houses, elevators, flour mills, factories, plants, etc.,
within and without the State of North Dakota, and
will employ managers, agents and others in the opera-
tion and carrying on of said warehouses, elevators,
flour mills, factories, etc., at great expense to the State
of North Dakota, and will acquire property within the

State of North Dakota for the purpose of establishing such enterprises as aforesaid, and as described and set forth in the Mill and Elevator Association Act as hereinbefore recited, by purchase or by virtue of the law of eminent domain, and at great expense to the State of North Dakota, and will enter upon the business of manufacture, storage, sale, exchange, and other methods of acquiring and disposing of all kinds of manufactured and raw farm and food products and by-products, and will do all other acts and things authorized or attempted to be authorized in and by the provisions of said Mill and Elevator Association Act, and in the doing thereof, will expend the full amount of the appropriation provided for in said Act, which said appropriation amounts to the sum of more than \$100,000.00.

That the said Industrial Commission and the members thereof as aforesaid, unless restrained and enjoined therefrom by the order and judgment of this Court, will proceed immediately to carry out the provisions of, the North Dakota Mill and Elevator Association Bond Act, as hereinbefore set forth, and in so carrying out said provisions, will expend the full sum of the appropriation provided for in said Act, to-wit: the sum of \$10,000.00.

That the said Industrial Commission and the members thereof as aforesaid, unless restrained and enjoined therefrom by the order and judgment of this

186
341 Court, will proceed immediately to carry out the provisions of the Home Building Act, as hereinbefore set forth, and in so carrying out said * provisions, will ex- (63)
pend the full sum of the appropriation provided for in said Act, to-wit: the sum of \$100,000.00.

342 That if the defendants herein named are permitted to use the public funds of the State of North Dakota as threatened and herein set forth, a deficit of public moneys and funds required for the purpose of meeting the expenses of the state government will be created, amounting to the sum of the appropriations aforesaid, to-wit: \$400,000.00, and that in the event of such deficit, the same would have to be restored
343 by taxation upon the property of the plaintiffs and the other taxpayers of the State.

XX.

344 That unless enjoined and restrained by the order and judgment of this court, the said defendant Obert Olson as State Treasurer aforesaid, will immediately prepare for issue, and the said Lynn J. Frazier as Governor aforesaid, and the said Obert Olson as State Treasurer aforesaid, will execute and issue negotiable bonds of the State of North Dakota in the aggregate amount of two million dollars under the pretended authority of the Bank of North Dakota Bond Act, as hereinbefore set forth, and Thomas Hall, secretary of State will attest the same, and with Carl Kozitsky, State Auditor, will certify to said bonds so executed,

as provided in said Bank of North Dakota Bond Act, 345
 which said bonds are and will be known and designated as Bonds of North Dakota, Bank Series, and thereupon said bonds will be delivered to the Industrial Commission hereinbefore referred to, and will be by said Commission and the members thereof as hereinbefore designated and referred to, negotiated and sold, thereby creating a liability against the State 346
 of North Dakota in the sum of two million dollars, which said liability can only be met and liquidated by moneys raised by taxation against the people and property of the State of North Dakota, and which moneys thus raised and said liability thus created will be for a private business enterprise, and contrary to, and in * violation of the rights of these plaintiffs and all 347
 other taxpayers in the State of North Dakota, and in violation of the fundamental principles of a republican form of government and the Constitution of the United States.

That the said defendants above named, and in this paragraph referred to, unless enjoined and restrained 348
 by the order and judgment of this court, will in the same manner as herein set forth, execute, issue, attest and certify bonds of the State of North Dakota under the provisions of the Bank of North Dakota Real Estate Bond Act hereinbefore set forth, in the aggregate amount of ten million dollars, to be known as Bonds of North Dakota, Real Estate Series, and there-

349 upon said bonds will be delivered to the Industrial
Commission hereinbefore referred to, and will be by
said Commission and the members thereof as herein-
before designated and referred to, negotiated and sold.

350 That the said defendants above named, and in this
paragraph referred to, unless enjoined and restrained
by the order and judgment of this court, will in the
same manner as herein set forth, execute, issue, attest
and certify bonds of the State of North Dakota under
the provisions of the Mill and Elevator Association
Bond Act hereinbefore set forth, in the aggregate
amount of five million dollars, to be known as Bonds
of North Dakota, Mill and Elevator Series, and there-
351 upon said bonds will be delivered to the Industrial
Commission hereinbefore referred to, and will be by
said Commission and the members thereof as herein-
before designated and referred to, negotiated and sold.

352 That the bonds aforesaid will constitute a liability
against the State of North Dakota in the aggregate
sum of Seventeen Million Dollars, which said liability
can only be met and liquidated by moneys raised by
taxation against the people and property of the State
of North Dakota, and which moneys thus raised, and
said liability thus created, * will be for private business (65)
enterprises, and in violation of the rights of these
plaintiffs and all other taxpayers of the State of North
Dakota, and of the fundamental principles of a repub-
lican form of government and the Constitution of the
United States.

That the bonds authorized by the acts of the Sixteenth Legislative Assembly, referred to herein, would be invalid, for the following reasons:

(a) Because issued for private business, and not for public purposes;

(b) For the reason that they would violate the constitution of the State of North Dakota in this: That no sufficient provision is made in said acts for a sinking fund to meet and pay the principal of the bonds to be issued under said acts, as required by Section 182 of the state constitution;

(c) For the reason that the legislature did not exercise its function of fixing the amounts, denominations, maturities and rate of interest on said bonds, but on the contrary attempted to delegate the legislative function of fixing and determining the same to the discretion of the Governor and the Industrial Commission.

* XXII.

That the purpose of the proposed expenditure of public funds and the creation of public debts of which these plaintiffs complain, is not a public or a governmental purpose, but is a private or business purpose, and is for the purpose of financial profit and gain for those who are interested in the various industries and enterprises and business projects proposed to be installed. That such enterprises do not rest upon the

357 public health or welfare of the people of the State, or
any other governmental reason which would justify
the proposed expenditures or the creation of the pro-
posed debts or in any manner come within the taxing
or police power of the State. That no condition exists
in the State of North Dakota which will authorize or
358 justify the State, in the exercise of its legitimate func-
tions of government, in engaging in the various lines
of private business contemplated as aforesaid, under
the said constitutional amendments and acts of the
legislature, or in making the proposed expenditures or
incurring the proposed debts. That the facilities now
provided for supplying the people of the State of
359 North Dakota with the necessities and luxuries of life,
and conveniences and requirements for their comfort,
welfare and health, are adequate.

North Dakota has an area of 79,837 square miles,
and a population, according to the war census, of 664,-
625. It has 53 counties, each of which is served by
one or more of six railroads, whose total mileage, in-
360 cluding main line and branch line trackage, is 6,295
miles.

On the lines of its several railroads are more than
250 incorporated cities and villages, and numerous un-
incorporated hamlets, and all together, more than one
thousand railroad stations or sidings where freight and
merchandise is loaded and unloaded, with numerous
privately owned general stores where merchandise and

food products, including flour, and all * the necessities of life, are kept for sale, and sold.

It has 74 flour mills in operation, which are scattered over the various parts of the State, with a capacity varying from 25 to 1800 barrels per day, and a total capacity of 16,720 barrels a day, or 5,000,000 barrels capacity for a year. The mills thus privately owned and operated have the capacity of producing between seven and eight times more flour than the people of North Dakota consume, and a capacity not only to feed all the people of the State, but still have for export to other states or countries, over four million barrels per year.

It has more than 2,000 licensed and privately owned warehouses and elevators located at railroad stations in the several counties of the state, with a total capacity for storing grain, of more than 60,000,000 bushels.

It has 706 state and national banks, with capital stock and surplus ranging from \$10,000 to \$560,000.

It also has a large number of loan and trust companies and numerous loan agencies, specializing in making of loans on farm lands, said individual loan agencies being distributed throughout the state, and in each and every county thereof. It also has a great number of building and loan associations specializing in making loans upon city property.

North Dakota has an area of 40,000,000 acres,

365 more than half of which is unbroken prairie, and used
for grazing and stock raising.

The principal occupation of the rural population of this state is that of grain growing, dairying and stock raising.

366 That a large proportion of the taxpayers of the State of North Dakota, who are the owners of a large part of the taxable property of the State, are in no manner interested in any of the business enterprises or projects authorized and provided for by the legislative acts here in question.

* XXIII.

367 That if the State of North Dakota were permitted to engage in the various enterprises, industries and projects hereinbefore referred to, the plaintiffs and the other taxpayers of the state, in whose behalf this suit is brought, will suffer irreparable injury and damage, and will become involved in a multiplicity of suits. That the plaintiffs and said other taxpayers will be denied the equal protection of the law, and will be
368 deprived of their property without due process of law, all in violation of their rights as citizens of a free government, and in violation of the guaranties of the Fourteenth Amendment to the Constitution of the United States. That they will be denied the protection of Section 4, Article 4, of the Constitution of the United States, guaranteeing to each state and the citizens hereof, a republican form of government. That

the protection of the guaranties of the constitution of the United States, referred to, is now claimed by the plaintiffs in their own behalf, and on behalf of all other taxpayers of the State. That these plaintiffs, and those in whose behalf this suit is prosecuted, have no adequate remedy at law. 369

XXIV.

The constitutional amendments and acts of the legislature hereinbefore set forth authorize the defendants in the operation and conduct of the various enterprises provided for in said acts, to incur and create obligations and indebtedness, in addition to the obligations and indebtedness hereinbefore specifically referred to, amounting to millions of dollars, for which indebtedness and obligations the State of North Dakota stands guarantor and for the payment and liquidation of which the property of the plaintiffs, and the other taxpayers of the State of North Dakota may be appropriated. 370 371

* WHEREFORE, and in consideration of which, and inasmuch as plaintiffs and all other taxpayers of the State of North Dakota, on behalf of whom this action is brought, are remediless at or by the strict rules of common law, and are only relievable in a court of equity where matters of this kind are properly cognizable, the plaintiffs file this bill of complaint against said defendants and pray: 372

373

1.

That the said defendants may be required to make full and true answer to this bill of complaint (but not under oath, answer under oath being hereby expressly waived).

2.

374

That section 182 of the constitution of the State of North Dakota, and all amendments thereto, insofar as the same pretends to or authorizes the said State to issue or guarantee the payment of bonds, issued or guaranteed for the purpose of raising funds, either to capitalize or to maintain and operate either or any of the proposed state-owned utilities, enterprises or business projects provided for in the legislative acts of the Sixteenth Legislative Assembly of the State of North Dakota, described as House Bill 17, House Bill 18, Senate Bill 20 and Senate Bill 19, as hereinbefore and in paragraph 17 set out in full, be adjudged and decreed illegal and void.

375

3.

376

That section 185 of the constitution of the State of North Dakota and all amendments thereto, insofar as the same pretend to or authorizes the said State to engage in any industry, enterprise or business of a private nature, and not within the governmental functions or police power of the State, be adjudged and decreed illegal and void.

That the act of the Sixteenth Legislative Assembly of the State of North Dakota, known as House Bill No. 17, and entitled

"An Act creating the Industrial Commission of North Dakota, authorizing it to conduct and manage on behalf of the State certain utilities, industries, enterprises and business projects, and defining its powers and duties; and making an appropriation therefor"

which said act is fully set out in paragraph 17 of this bill of complaint, in so far as the same pretends to, or authorizes the so-called Industrial Commission thereby, and by the terms of said act created, to engage in, take charge of, control, manage, or in any manner establish, conduct, or operate any utility, industry, enterprise or business project of a private nature and not within the governmental functions or police power of the State, be adjudged illegal and void.

5.

That the act of the Sixteenth Legislative Assembly of the State of North Dakota, known as House Bill No. 18, and entitled:

"An Act, declaring the purpose of the State of North Dakota to engage in the banking business and establishing a system of banking under the name of the Bank of North Dakota, operated by the State, and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; making an appropriation therefor; and providing penalties for the violations of certain provisions thereof"

181 which said act is set out in full in paragraph 17 of
 182 this bill of complaint, be adjudged and decreed as pre-
 183 tending to and authorizing the said State of North
 184 Dakota to enter upon and conduct a business project of
 185 a purely private nature (to-wit: the establishment of
 186 and carrying on of a system of banking), and that the
 187 same is not within the provisions of any government-
 188 al function or police power of the State, and that the
 189 said legislative act, being House Bill No. 18, and all
 190 authority pretended to be or given thereunder, be
 191 adjudged and decreed illegal and void.

* 6.

(71)

192 That the act of the Sixteenth Legislative Assembly of
 193 the State of North Dakota, known as House Bill No.
 194 49, and entitled:

195 "An act providing for the issuing of bonds of
 196 the State of North Dakota in the sum of two
 197 million dollars, to be known as "Bonds of North
 198 Dakota, Bank Series"; prescribing the terms,
 199 and stating the purposes thereof; providing a tax
 200 and making other provision for the payment
 201 thereof; making appropriations for the payment
 202 of said bonds, and to carry into effect the pro-
 203 visions of this Act; and declaring this Act to be
 204 an emergency measure"

205 which said act is set out in full in paragraph 17 of
 206 this bill of complaint, be adjudged and decreed as
 207 pretending to and authorizing the said State of North
 208 Dakota to issue certain bonds in the aggregate sum
 209 of two million dollars to be used, and the proceeds
 210 thereof to be used in a purely private business pro-

ject, not within the provisions of any governmental function or police power of the said state, and that said act, being House Bill No. 49, and all authority pretended to be, or granted thereunder or thereby, for the issuance of any bond or bonds of the State of North Dakota, be adjudged and decreed illegal and void.

7.

That the act of the Sixteenth Legislative Assembly of the State of North Dakota, known as Senate Bill No. 130, and entitled:

"An Act providing for the issuing of bonds of the State of North Dakota in a sum not exceeding Ten Million Dollars, to be known as "Bonds of North Dakota, Real Estate Series," prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal on said bonds, and to carry into effect the provisions of this Act; and declaring this Act to be an emergency measure,"

which act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to, and authorizing the said State of North Dakota to issue certain bonds in the aggregate sum of ten million dollars to be used, and the proceeds thereof to be used in a purely private business project not within the provisions of any governmental * function or police power of the said State, and that said Act, being Senate Bill No. 130, and all authority pretended to be or granted thereunder and thereby, for the issuance

38 of any bond or bonds of the State of North Dakota, be adjudged and decreed illegal and void.

8.

That the act of the Sixteenth Legislative Assembly of the State of North Dakota, known as Senate Bill No. 20, and entitled:

300 "An Act declaring the purpose of the State of North Dakota to engage in the business of manufacturing and marketing of farm products, and for establishing a warehouse, elevator and flour mill system under the name of North Dakota Mill and Elevator Association operated by the State, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management; and making an appropriation therefor"

301 which said act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to and authorizing the said State of North Dakota to engage in a purely private business project or enterprise, to-wit: the business of manufacturing and marketing of farm products, and for the estab-
 302 lishing of warehouses, elevators and flour mills, either within or without the State, or in foreign countries, and that such business projects or enterprises are not within the provisions of any governmental function or police power of said state, and that said act, being Senate Bill No. 20, and all authority for the establishment, maintenance and conduct of each, any or all of the businesses therein provided for, be adjudged and decreed illegal and void.

That the act of the Sixteenth Legislative Assembly of the State of North Dakota, known as Senate Bill No. 75, and entitled:

* "An Act providing for the issuing of bonds of the State of North Dakota in a sum not exceeding Five Million Dollars to be known as "Bonds of North Dakota, Mill and Elevator Series"; prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal of said bonds, and to carry into effect the provisions of this act; and declaring this act to be an emergency measure"

which said act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to, and authorizing the said State of North Dakota to issue certain bonds in the aggregate sum of five million dollars to be used, and the proceeds thereof to be used in a purely private business project, not within the provisions of any governmental function or the police power of the said State, and that said act, being Senate Bill No. 75, and all authority pretended to be or granted thereunder and thereby, for the issuance of any bond or bonds of the State of North Dakota, be adjudged and decreed illegal and void.

That the act of the Sixteenth Legislative Assembly of the State of North Dakota, known as Senate Bill No. 19, and entitled:

397

"An Act declaring the purpose of the State of North Dakota to engage in the enterprise of providing homes for residents of this state, and to that end to establish a business system operated by the State under the name of the Home Building Association of North Dakota, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management; and making an appropriation therefor,"

398

which said act is set out in full in paragraph 17 of this bill of complaint, be adjudged and decreed as pretending to, and authorizing the State of North Dakota to enter upon, establish and conduct a purely private business project or enterprise, to-wit: the building of homes and loaning of money upon real estate security, and that such business project or enterprise is not within the provisions of any governmental function or police power of the said State, and that said act, being Senate Bill No. 19, and all authority pretended to be or granted thereunder and thereby for the establishment and conduct of the business project or enterprise therein provided for be adjudged and decreed illegal and void.

400

* II.

(7)

That the said defendant Obert Olson individually and as State Treasurer of the State of North Dakota be forever enjoined and prohibited by the order, judgment and decree of this court, from preparing or issuing, either or any of the bonds of the State of North Dakota attempted to be, pretended to be, or author-

ized by House Bill No. 49, Senate Bill No. 130 or 401
Senate Bill No. 75, hereinbefore referred to; and that
the said defendant Thomas Hall, individually and as
secretary of state in and for the State of North Da-
kota, be by the order, judgment and decree of this
court, forever enjoined and prohibited from attesting
either or any of the bonds so provided in said bills in
this paragraph of the prayer mentioned; and that the 402
said defendants, Carl Kozitsky, individually and as
Auditor of the State of North Dakota, and the said
Thomas Hall, individually and as Secretary of State
of the State of North Dakota, be forever enjoined and
prohibited by the order, judgment and decree of this
court, from signing and endorsing upon each, either
or any of said bonds so attempted to be, pretended to 403
be, or authorized to be issued as aforesaid, any certi-
ficates showing that said bonds, or any of them were
issued pursuant to law and within the debt limit of the
State; and that the said Lynn J. Frazier individually
and as Governor of the State of North Dakota, and
the said Obert Olson individually and as Treasurer 404
of the State of North Dakota, be forever enjoined and
prohibited from executing any of the said bonds so
attempted to be, pretended to be, or authorized to be
issued by either of said legislative acts herein, and in
this paragraph of the prayer referred to; and that said
defendants individually and as officers as aforesaid,
each and all be forever enjoined and prohibited by the

405 order, judgment and decree of this court, from deliv-
 ering any bonds so pretended to be or authorized un-
 der the provisions of each or any of the said acts of
 the Sixteenth *Legislative Assembly of the State of
 North Dakota herein, and in this section of the prayer
 referred to, to the said Industrial Commission author-
 406 ized under the provisions of House Bill No. 17 afore-
 said; and that the said Lynn J. Frazier, Governor of
 the State of North Dakota, John N. Hagan, Commis-
 sioner of Agriculture and Labor of the said State,
 and William Langer, Attorney General of said State,
 individually and in their official capacity, and as mem-
 407 bers of the Industrial Commission aforesaid, be for-
 ever enjoined and prohibited from negotiating, sell-
 ing, or otherwise disposing of any bond or bonds
 issued under the provisions of any said act of the Six-
 teenth Legislative Assembly of the State of North Da-
 kota as hereinbefore set forth, being House Bill No.
 18, House Bill No. 49, and Senate Bill No. 75, here-
 inbefore more particularly referred to.

408 * 12.

That the appropriations provided for and attempted
 to be made, or made in and by the provisions of the
 certain acts of the Sixteenth Legislative Assembly of
 the State of North Dakota, known as House Bill No.
 17, House Bill No. 18, House Bill No. 49, Senate Bill
 No. 130, Senate Bill No. 20, Senate Bill No. 75, and
 Senate Bill No. 19, which said acts are set out in

full in paragraph 17 of this bill of complaint, be by the order, judgment and decree of this court declared the appropriation of public funds of the State of North Dakota for private use, and illegal and void.

13.

That Lynn J. Frazier as Governor of said State, Carl Kozitsky as State Auditor, William Langer as Attorney General, Obert Olson as State Treasurer, and Thomas Hall as Secretary of State, constituting the State Auditing Board, of the said State of North Dakota, individually, and as such officers and members of said Board, be forever enjoined and prohibited by the order, judgment and decree of this court from auditing any claim or demand for a warrant or other character of requisition upon the funds of the State of North Dakota for the payment of any of the appropriations attempted to be made, or made in any or either of the acts of the Sixteenth Legislative Assembly of the State of North Dakota known as House Bill No. 17, House Bill No. 18, House Bill No. 49, Senate Bill No. 130, Senate Bill No. 20, Senate Bill No. 75, and Senate Bill No. 19.

Also that the said defendant Carl Kozitsky, as auditor of the said state of North Dakota, be by the order, judgment and decree of this court, forever enjoined and prohibited from drawing, executing and delivering his warrant or order upon the treasurer of the State of North Dakota, for the payment of any

413 of the funds of the State of North Dakota in payment
 of any of the funds of the State of North Dakota in
 payment of any or either of the appropriations made
 * as aforesaid in said bills in this paragraph of the (7)
 prayer enumerated; and that the defendant, Obert
 Olson as State Treasurer of the said State of North
 414 Dakota be by the order, judgment and decree of this
 court forever enjoined and prohibited from paying out
 of the funds of the said State of North Dakota, any
 order, warrant, draft or other requisition calling for
 the payment of any of said funds because of any au-
 thority, pretended to be given, or given in and by
 any or either of the said legislative acts in this para-
 415 graph of this prayer enumerated.

14.

That the defendants Lynn J. Frazier, governor, Wil-
 liam Langer Attorney General, Thomas Hall, Secre-
 tary of State, Carl Kozitsky, State Auditor, and Min-
 nie J. Nielson, Superintendent of Public Instruction,
 constituting the "Board of University and School
 416 Lands," individually and officially, as officers of the
 said State of North Dakota, and as said Board of Uni-
 versity and School Lands, be by the order, judgment
 and decree of this court forever enjoined and pro-
 hibited from investing any of the funds of the State
 of North Dakota realized from the sale of school lands
 in any bond, or bonds, issued, negotiated or sold un-
 der the provisions of either or any of the acts of the

Sixteenth Legislative Assembly of the State of North
 Dakota, known and referred to as House Bill No. 49,
 Senate Bill No. 130, and Senate Bill No. 75, and that
 said defendants in this paragraph of this prayer
 enumerated, individually and as officers of the said
 State of North Dakota, and members of the said
 Board of University and School Lands, be, by the
 order, judgment and decree of this court, forever en-
 joined and prohibited from placing or depositing any
 of the funds of the State of North Dakota derived
 from the sale of school lands of the State of North
 Dakota in any bank attempted to be, or organized un-
 der and by virtue of the provisions of the * act of the
 Sixteenth Legislative Assembly of the State of North
 Dakota known and described as House Bill No. 18.

15.

That a temporary order be issued against the defend-
 ants restraining and enjoining them from carrying out
 or attempting to carry out the provisions of the con-
 stitutional amendments and acts of the legislature
 aforesaid during the pendency of this action; and re-
 straining and enjoining said defendants from doing
 or performing any of the acts or things complained of
 herein, during the pendency of this action.

16.

That plaintiffs have such other and further relief in
 the premises as the nature of the case shall require,
 and to Your Honor shall seem meet and proper.

Plaintiffs further pray that a writ of subpoena be issued directed to said defendants and each of them, commanding them, and each of them to appear and make answer to plaintiff's bill of complaint at a certain time, and to abide the further orders of the Court.

N. C. YOUNG,

J. S. WATSON,

E. T. CONMY,

Of Fargo, N. D.,

TRACY R. BANGS,

PHILIP R. BANGS,

C. J. MURPHY,

T. A. TONER,

Of Grand Forks, N. D.,

Solicitors for Plaintiffs.

STATE OF NORTH DAKOTA,
County of Cass, ss.

435

WILLIAM JAMES HOWE, being duly sworn, deposes and says that he is one of the plaintiffs in the above entitled suit; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to the knowledge of the deponent, except as to matters therein stated upon information and belief, and that as to those matters he believes it to be true. 436

WILLIAM JAMES HOWE.

Subscribed and sworn to before me this 29th day of March, 1919.

(SEAL)

E. T. CONMY,
Notary Public, Cass Co., N. D. 437

STATE OF NORTH DAKOTA,
County of Grand Forks. ss.

JOHN W. SCOTT, being duly sworn, deposes and says that he is one of the plaintiffs in the above entitled suit; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to the knowledge of the deponent, except as to matters therein stated upon information and belief, and that as to those matters he believes it to be true. 438

JOHN W. SCOTT.

Subscribed and sworn to before me this 31st day of March, 1919.

(SEAL)

H. N. HAMILTON,
Deputy Clerk, U. S. District Court.

MAR 25 1920

JAMES U.

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1919.

No. 508.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVER-
SON, ET AL,

Appellants,

VS.

LYNN J. FRAZIER, ET AL,

Appellees.

APPELLANTS' BRIEF.

N. C. YOUNG,

Fargo, N. D.,

TRACY R. BANGS,

C. J. MURPHY,

Grand Forks, N. D.,

Attorneys for Appellants.



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No. 508.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, L. A. WOOD, NELS NICHOLS, GEORGE SIDENER, EMIL SCOW, W. C. MARTIN, HENRY MCLEAN, GEORGE P. HOMNES, B. W. HERSEY, T. W. BAKER, GEORGE CHRISTENSON, R. H. LEVITT, E. J. MEGEATH, E. A. ANDERSON, S. B. OAKLEY, O. F. BRYANT, GEORGE D. ELLIOTT, JOHN SATTERLUND, P. S. CHAFFEE, ALFRED THURING, J. S. GARNETT, J. E. BAKER, JOHN R. EARLY, H. C. JOHNSON, JOHN C. LEACH, FRED STECKNER, FRED L. ROQUETTE, IVER K. BAKKEN, MICHAEL TOAY, J. L. HARVEY, WILLIAM BURNETT, NATHAN UPHAM, ORLANDO BROWN, J. O. HANCHETT, W. W. WILDE, ARLO ANDREWS, DUNCAN BROWNLIE, W. W. COFELL, E. B. ROSCOE, C. H. KINNEY, on behalf of themselves, and all other taxpayers of the State of North Dakota,

Appellants,

vs.

LYNN J. FRAZIER, WILLIAM LANGER and JOHN N. HAGAN, acting and pretending to act as the Industrial Commission of North Dakota; LYNN J. FRAZIER, CARL KOZITSKY, WILLIAM LANGER, OBERT OLSON, and THOMAS HALL, acting as the

State Auditing Board; LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY and MINNIE J. NIELSON, constituting and acting as the Board of University and School Lands; OBERT OLSON, as State Treasurer of the State of North Dakota, CARL KOZITSKY, as State Auditor of the State of North Dakota, and LYNN J. FRAZIER, as Governor of said State, WILLIAM LANGER, as Attorney General of said State, JOHN N. HAGAN, as Commissioner of Agriculture and Labor of said State, THOMAS HALL, as Secretary of State of said State, and MINNIE J. NIELSON, as Superintendent of Public Instruction of said State, and LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, OBERT OLSON, JOHN N. HAGAN and MINNIE J. NIELSON, individually,

Appellees.

APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

This is a taxpayers' suit. The action was brought in the United States District Court for the District of North Dakota, by forty-two resident taxpayers, to enjoin the defendants from diverting the tax funds of that state to private and business purposes; to enjoin them from issuing and selling state bonds and using the proceeds thereof for such purposes; to declare void the legislative Acts of the Sixteenth Legislative Assembly, known as House Bills 17, 18 and 49, and Senate Bills 130, 20, 75 and 19, which in form authorize such ex-

expenditures and the issuance of the bonds in question; and to declare void certain amendments to sections 185 and 182 of the North Dakota Constitution, which purport to have been adopted in 1919, and to authorize the legislative Acts above referred to.

The defendants attacked the Bill by motion to dismiss, under equity rule No. 29. (Tr. pgs. 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.)

The defendants are state officers. They are: Lynn J. Frazier, Governor; John N. Hagen, Commissioner of Agriculture and Labor; William Langer, Attorney General; Carl Kozitsky, State Auditor; Thomas Hall, Secretary of State, and Obert Olson, State Treasurer. (Tr. pg. 2, par. 2.) Each of said defendants is charged with a specific duty in carrying into effect the legislative Acts above referred to. (Tr. pgs. 2 and 3, par. 3, 5, 6, 7.) (Tr. pgs. 8, 9, 10 and 11, par. 19 and 20.)

Minnie J. Nielson, State Superintendent of Public Instruction, and the members of the Board of University and School Lands, were originally named as defendants. Prior to the submission of the case, and by stipulation, the case was dismissed as to her and as to the said Board and all the members thereof. (Tr. pgs. 71-72.)

In the trial court, Governor Frazier and Commissioner Hagen were represented by special counsel. The remaining defendants were represented by the Attorney General and his assistants. (Tr. pgs. 52, 53, 66, 67, 68 and 72.)

The Bill alleges (Tr. pgs. 3 and 4, par. 8 of Bill):

"That plaintiffs are taxpayers of the State of North Dakota and are owners of both real and personal property in this state, and in the counties of their residence, which is subject to taxation to meet the obligations of the state, and also subject to local taxes. That the plaintiffs, and the other taxpayers of the state of North Dakota are the beneficial owners, subject to the legal and proper use thereof by the state of North Dakota for state purposes, of all moneys and funds now in the Treasury of the state of North Dakota, collected by taxation for the purpose of defraying the expenses of the government of the state, and which funds are held and controlled by the defendants, as officers of the state, as hereinbefore described. That said funds are held in trust by the defendants in their official capacity, for the plaintiffs and the other taxpayers of the state. That said funds now amount to more than three hundred thousand dollars. That from time to time additional sums of money, amounting to hundreds of thousands of dollars each year, raised by taxation against the property of plaintiffs, and the other taxpayer of the state of North Dakota, are being collected and covered into the Treasury of the state, for the purpose of defraying the legitimate expenses of the state government, and the defendants, in their official capacity aforesaid, come into the custody and control of said moneys as the same are collected as hereinbefore set forth. That the State of North Dakota has no moneys, funds, or property, aside

from that collected by the taxation of the property of the plaintiffs and the other taxpayers of the state, except moneys realized from school and institutional lands granted to the state by the United States at the time of admission to the Union. That said school and institutional lands and moneys realized therefrom cannot, under the compact with the United States, be used for any purpose other than the maintenance and support of the schools and institutions of learning of the state and for the purpose of maintaining and supporting other public institutions of the state. That the plaintiffs bring this action as taxpayers on behalf of themselves and on behalf of the other taxpayers of the state who are many thousand in number, and who have a common and general interest in the questions presented in this case, and are so numerous as to make it impracticable to bring them all before the court."

(Tr. page 4, par. 9.) "This is a suit in equity between the plaintiffs and the said defendants, and arises under the constitution and laws of the United States, as hereinafter will more particularly appear; and involves, exclusive of interest and costs, a sum or value in excess of \$300,000.00 of moneys now in the Treasury of the state of North Dakota, derived from taxation of property and persons in said state, and \$17,000,000.00 in bonds of the state of North Dakota, to be issued as hereinafter set forth, which said bonds, if permitted to issue, create a charge upon the property of the state of North Dakota, which must be met by the taxation of the people and property of said state; and that each of the matters in controversy in this action, exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and that each of said matters arises under the Constitution and laws of the United States."

(Tr. pgs. 4 and 5, par. 10.) "That the defendants, assuming and claiming to act as of-

ficers of the state, and in an official capacity, and under the pretended authority of certain amendments to the state Constitution of North Dakota, which are claimed to have become effective on or about February 1st, 1919, and certain pretended Acts of the Sixteenth Legislative Assembly of North Dakota, which in form took effect on the 26th day of February, 1919, all of which are hereinafter set out, threaten to divert, pay out and transfer, and unless restrained and enjoined by this Court, will pay out, divert and transfer from the general funds of the state, and from the funds of the cities, villages, townships and school districts of the state derived from taxation, and from the permanent school funds of the state, large sums of money in the purchase of the bonds herein referred to and for other unlawful purposes; and threaten to create and issue, and unless restrained and enjoined by this Court, will create and issue, obligations of the state in the form of state bonds, aggregating in amount the sum of \$17,000,000.00 for unlawful purposes, and threaten to negotiate and sell, and unless restrained and enjoined by this court, will negotiate and sell said bonds, and will pledge the faith and credit of the state of North Dakota for the payment thereof."

(Tr. pg. 5, par. 11.) "The defendants justify the Acts of which complaint is made in this action by the alleged amendments to the state Constitution approved on or about February 1st, 1919, and the pretended Acts of the Sixteenth Legislative Assembly, approved February 26th, 1919, referred to in paragraph 10 hereof."

(Tr. pgs. 5 and 6, par. 12.) Sets out in full Section 202 of the state Constitution which provides two methods for its amendment. Under one of them, "a majority of the electors qualified to vote for members of the legislative assembly voting thereon" is required for its adoption, whereas, the other method requires

"a majority of all the legal votes cast at such general election."

(Tr. pg. 6, par. 13.) "Prior to February 1st, 1919, Section 185 of the state Constitution was in force and read as follows: 'Neither the state nor any county, city, township, town, school district, or any other political subdivision shall loan or give its credit or make donation to or in aid of any individual, association or corporation except for necessary support of the poor; nor subscribe to or become the owner of the capital stock of any association or corporation; nor shall the state engage in any work of internal improvement unless authorized by a two-thirds vote of the people. Provided, that the state may appropriate money in the Treasury or to be thereafter raised by taxation for the construction or improvement of public highways.'

That on or about February 1st, 1919, the foregoing section was in form amended to read as follows: 'Section 185, Article 12 as amended by Article 18 of the amendment. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business not prohibited by Article 20 of the Constitution (the manufacture and sale of intoxicating liquor), but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation, except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.'

(Tr. pgs. 6 and 7, par. 14.) "That prior to February 1st, 1919, the state debt limit was fixed by Section 182 of the state Constitution at \$200,000, which so far as material, reads as follows:

"The state may, to meet casual deficits or failure in the revenue, or in case of extraordinary

emergencies, contract debts, but such debts shall never in the aggregate exceed the sum of two hundred thousand dollars, exclusive of what may be the debt of North Dakota, at the time of the adoption of the Constitution.

* * * No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for public defense, in case of threatened hostilities."

"That said Section 182 of the Constitution was in form amended on or about February 1st, 1919, to read as follows:

"Section 182 in Article 12. The state may issue or guarantee the payment of bonds, providing that all bonds in excess of two million dollars shall be secured by first mortgages upon real estate in amounts not to exceed one-half of its value; or upon real estate or personal property of state owned utilities; enterprises or industries, in amounts not exceeding its value, and provided, further, that the state shall not issue or guarantee bonds upon property of state owned utilities, enterprises or industries in excess of ten million dollars. No future indebtedness shall be incurred by the state unless evidenced by bond issue, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax, or make other provisions sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax, or of such other provision for the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war,

or to provide for the public defense in case of threatened hostilities.' "

(Tr. pg. 7, par. 15.) "That the pretended amendments to Section 182 and 185 of the State Constitution hereinbefore set out, and the Acts of the Legislature of the State of North Dakota, adopted in pursuance and under the pretended authority thereof and referred to herein are void and of no force or validity, for the following reason, among others, to-wit: That said constitutional amendments were submitted and voted upon at the general election held in the fall of 1918, and did not receive a majority of all the legal votes cast at such election."

(Tr. pgs. 7 and 8, par. 16.) "That the sixteenth Legislative Assembly of the State of North Dakota, after in form approving the constitutional amendments hereinbefore referred to, and for the purpose of carrying out the Industrial Program thereunder and therein authorized, passed the following Acts, all of which were declared adopted by sufficient vote to place them in operation on their approval, and which said pretended Acts were approved on February 26th, 1919, to-wit: House Bills 17, 18 and 49 and Senate Bills 130, 20, 75 and 19."

These Acts are set out in full in par. 17 of the bill (Tr. pgs. 8, 21 to 52). A general description of each Act, with reference to the pages of the Transcript where the complete Act will be found, is as follows:

House Bill 17, Tr. pgs. 21 to 24: "The Industrial Commission Act," creates an industrial commission composed of the Governor, Commissioner of Agriculture and Labor, and Attorney General, as a managerial body, to "conduct and manage on behalf of the state, certain utilities, industries, enterprises and business projects," and makes an appropria-

tion of \$200,000.00 of the general funds of the state to carry out the provisions of the Act.

House Bill 18, Tr. pgs. 24 to 30: The "Bank of North Dakota Act", charters the Bank of North Dakota and places its management under the Industrial Commission and fixes its capital at \$2,000,000.00, all of which is to be provided by the state, and appropriates \$100,000.00 to carry the Act into effect.

House Bill 49, Tr. pgs. 31 to 35: The "Bank of North Dakota Bond Act" authorizes the issuance of \$2,000,000.00 in state bonds to furnish the capital for the bank and appropriates \$10,000.00 to carry the Act into effect.

Senate Bill 130, Tr. pgs. 35 to 40: The "North Dakota Real Estate Bond Act", authorizes the issuance for the Bank's use of \$10,000,000.00 in state bonds to furnish a revolving fund, which bonds are to be secured by real estate mortgages, and appropriates \$10,000.00 to carry the Act into effect.

Senate Bill No. 20, Tr. pgs. 40 to 42: The "Mill and Elevator Association Act", charters the North Dakota Mill and Elevator Association. Section one of the Act states that its purpose is to "establish a system of warehouses, elevators, flour mills, factories, plants, machinery and equipments, owned, controlled and operated by it." The Act appropriates \$118,000.00.

Senate Bill 75, Tr. pgs. 43 to 48: The "Mill and Elevator Association Bond Act", provides for the issuance of \$5,000,000.00 in state bonds for the capital stock of the Mill and Elevator Association, which bonds are to be secured upon the industries and business projects owned by the state, and appropriates \$10,000.00 to carry the Act into effect.

Senate Bill 19, Tr. pgs. 48 to 51: The "Home Building Act", charters the "Home Building Association," authorizes it to build and sell

farm and city homes, and appropriates \$100,000.00 to carry the Act into effect.

(Tr. p. 8, par. 18) alleges: "That the amendments to Sections 182 and 185 of the Constitution, hereinbefore set out, and the Acts of the Legislature set out in the preceding paragraph, purport and pretend to authorize the State of North Dakota to enter into private industries, enterprises, and business projects, such as general banking, buying, selling and handling grain, owning and operating elevators and flour mills, home building, and general real estate loan business, general merchandising, and other business of every character and description."

(Tr. pgs. 8, 9, and 10, par. 19) alleges: That the defendants are now expending and will expend all of the appropriations made by the several Acts, and that unless enjoined that they 'will engage in and undertake all of the different enterprises and business projects specially provided and under the said Acts of the Legislature hereinbefore set forth.' * * *

"That if the defendants herein named are permitted to use the public funds of the State of North Dakota as threatened and herein set forth, a deficit of public moneys and funds required for the purpose of meeting the expenses of the State government will be created, amounting to the sum of the appropriations aforesaid, to-wit, \$400,000.00, and that in the event of such deficit, the same would have to be restored by taxation upon the property of the plaintiffs and the other taxpayers of the state."

(Tr. pgs. 10 and 11, par. 20.) That unless enjoined, the defendants will issue and negotiate the bonds in question and create a liability against the State, "which said liability can only be met and liquidated by moneys raised by taxation against the people and property of the State of North Dakota, and which

moneys thus raised and said liability thus created will be for a private business enterprise, and contrary to, and in violation of the rights of these plaintiffs and all other taxpayers in the State of North Dakota, and in violation of the fundamental principles of a Republican form of government and the Constitution of the United States."

(Tr. pgs. 11 and 12, par. 21.) "That the bonds authorized by the Acts of the Sixteenth Legislative Assembly, referred to herein, would be invalid, for the following reasons:

(a) Because issued for private business, and not for public purposes;

(b) For the reason that they would violate the Constitution of the State of North Dakota in this: That no sufficient provision is made in said Acts for a sinking fund to meet and pay the principal of the bonds to be issued under said Acts, as required by Section 182 of the State Constitution.

(c) For the reason that the legislature did not exercise its function of fixing the amounts, denominations, maturities and rate of interest on said bonds, but on the contrary attempted to delegate the legislative function of fixing and determining the same to the discretion of the Governor and the Industrial Commission."

(Tr. pgs. 12 and 13, par. 22.) "That the purpose of the proposed expenditure of public funds and the creation of public debts of which these plaintiffs complain, is not a public or a governmental purpose, but is a private or business purpose, and is for the purpose of financial profit and gain for those who are interested in the various industries and enterprises and business projects proposed to be installed. That such enterprises do not rest upon the public health or welfare of the people of the State or any other governmental reason which would justify the proposed expenditures or the creation of the proposed debts or in any manner

come within the taxing or police power of the state. That no condition exists in the State of North Dakota which will authorize or justify the State, in the exercise of its legitimate functions of government, in engaging in the various lines of private business contemplated as aforesaid, under the said constitutional amendments and Acts of the Legislature, or in making the proposed expenditures or incurring the proposed debts. That the facilities now provided for supplying the people of the State of North Dakota with the necessities and luxuries of life, and conveniences and requirements for their comfort, welfare and health are adequate."

"North Dakota has an area of 79,837 square miles, and a population, according to the war census, of 664,625. It has 53 counties, each of which is served by one or more of six railroads, whose total mileage, including main line and branch line trackage, is 6,295 miles."

"On the lines of its several railroads are more than 250 incorporated cities and villages, and numerous unincorporated hamlets, and all together more than one thousand railroad stations or sidings where freight and merchandise is loaded and unloaded, with numerous privately-owned general stores where merchandise and food products, including flour, and all the necessities of life, are kept for sale, and sold."

"It has 74 flour mills in operation, which are scattered over the various parts of the state, with a capacity varying from 25 to 1800 barrels per day; and a total capacity of 16,720 barrels a day, or 5,000,000 barrels capacity for a year. The mills thus privately owned and operated have the capacity of producing between seven and eight times more flour than the people of North Dakota consume, and a capacity not only to feed all the people of the State, but still have for export to other states

or countries, over four million barrels per year."

"It has more than 2,000 licensed and privately owned warehouses and elevators located at railroad stations in the several counties of the state, with a total capacity for storing grain, of more than 60,000,000 bushels."

"It has 706 state and national banks, with capital stock and surplus ranging from \$10,000 to \$560,000."

"It also has a large number of loan and trust companies and numerous loan agencies, specializing in making of loans on farm lands, said individual loan agencies being distributed throughout the state, and in each and every county thereof. It also has a great number of building and loan associations specializing in making loans upon city property."

"North Dakota has an area of 40,000,000 acres, more than half of which is unbroken prairie, and used for grazing and stock raising."

"The principal occupation of the rural population of this State is that of grain growing, dairying and stock raising."

"That a large proportion of the taxpayers of the State of North Dakota, who are the owners of a large part of the taxable property of the State, are in no manner interested in any of the business enterprises or projects authorized and provided for by the legislative Acts here in question."

(Tr. pg. 13, par. 23.) "That if the state of North Dakota were permitted to engage in the various enterprises, industries and projects hereinbefore referred to, the plaintiffs and the other taxpayers of the State, in whose behalf this suit is brought, will suffer irreparable injury and damage, and will become involved in a multiplicity of suits. That the plaintiffs and said other taxpayers will be denied the equal

protection of the law, and will be deprived of their property without due process of law, all in violation of their rights as citizens of a free government, and in violation of the guarantees of the Fourteenth Amendment to the Constitution of the United States. That they will be denied the protection of Section 4, Article 4 of the Constitution of the United States, guaranteeing to each state and the citizens thereof, a Republican form of government. That the protection of the guarantees of the Constitution of the United States, referred to, is now claimed by the plaintiffs in their own behalf, and on behalf of all other taxpayers of the State. That these plaintiffs, and those in whose behalf this suit is prosecuted, have no adequate remedy at law."

(Tr. pgs. 14 to 20.) In addition to the injunctive relief asked, the plaintiffs pray that the constitutional amendments and the legislative Acts in question, making the appropriation of public funds, and authorizing the bond issues, be declared illegal and void.

MOTION TO DISMISS BY SPECIAL COUNSEL.

(Tr. pgs. 52 and 53.) On April 7, 1919, counsel for Governor Frazier and Commissioner Hagen, filed a motion to dismiss, stating the following grounds:

"(1) Because it appears in the complaint filed in this cause that there is insufficiency of fact to constitute a valid cause of action in equity against these defendants or any of them, and that said complaint fails to allege facts constituting such cause of action."

"(2) Because it appears in the complaint filed in this cause that this Honorable Court has no jurisdiction of the subject matter of the pretended cause of action set forth in said complaint."

(Tr. pg. 67.) The motion was noticed for hearing on April 25, 1919.

MOTION TO DISMISS BY ATTORNEY GENERAL.

(Tr. pgs. 53 to 66.) On the return day, to-wit: April 25, 1919, the Attorney General filed an answer on behalf of the defendants represented by him, and also submitted a motion to dismiss on the following grounds:

(Tr. pgs. 67, 68.) "First: The Court is without jurisdiction to hear and determine this action because:

(a) The Bill of Complaint shows on its face that it is in effect an action against the sovereign State of North Dakota and fails to show that the State of North Dakota has consented to be sued in this action.

(b) The Bill of Complaint fails to show that the matter in controversy, or cause of action, alleged therein, arises under the laws or the Constitution of the United States.

(c) The Bill of Complaint fails to show that the interests of any one of the plaintiffs in the matter in controversy exceeds in value the sum of three thousand dollars (\$3,000.00) and shows that the plaintiffs form a class of parties who have relation to the common fund sought to be administered.

Second: That there is a non-joinder of parties defendant to this action, for the reason that the Bill of Complaint on its face shows that the State of North Dakota is the real party defendant, and the State of North Dakota is not made a party defendant to the action and said State cannot be made a party defendant.

Third: That the Bill of Complaint does not state facts sufficient to constitute a valid cause of action in equity."

AMENDED MOTION TO DISMISS BY SPECIAL COUNSEL

(Tr. pgs. 68 to 71.) Thereafter, and on May 2nd, 1919, Special Counsel for Frazier and Hagan filed what is called "An Amended Motion to Dismiss." The grounds for dismissal stated in this "Amended Motion" are identical with those stated in their original motion and hereinbefore set out. This Amended Motion invokes in its support facts which are extrinsic to the bill of complaint and in contradiction of the allegations thereof and entirely outside of the record. After repeating the grounds of the former motion, this "Amended Motion" states:

"The said motion is made upon the bill of complaint and all the files and proceedings herein and upon all matters of which said court will take notice, including, among others, certain matters of fact, to-wit".

This is followed by 19 subdivisional references to various statutes, concurrent resolutions, constitutional amendments, election returns, of which the Court is asked to take notice. Subdivisions 12 and 14, Tr. page 70, read as follows:

"12. In 1916 and 1918 the Republican platform upon which the present state administration was elected both times by an overwhelming majority, advocated unequivocally rural credit banks, state-owned terminal elevators, and flour mills, packing plants, etc."

"14. During the primary and general elections of 1916 and 1918 the principal issues in the campaigns were the building and operation by the State of terminal elevators, flour mills,

packing plants and other public utilities, state hail insurance, and rural credit banks."

DECREE.

On June 14th, 1919, a decree was entered dismissing the bill with costs and an opinion was filed which will be found on Tr. pgs. 72 to 83.

(Tr. pg. 84.) To remove any doubt which might arise from the language of the opinion as to whether the decree was upon the merits, the Court in allowing the appeal from the decree stated, that "the Court passed and intended to pass on the merits."

SPECIFICATIONS OF ERROR.

1.

"The Court erred in granting defendants' motion to dismiss the action."

2.

"The Court erred in holding that the amount in controversy in this action does not exceed the sum of three thousand dollars."

3.

"The Court erred in holding that the constitutional provisions and statutes of North Dakota, set out in the Bill, do not violate the Fourteenth Amendment to the Federal Constitution."

4.

"The Court erred in entering the decree dismissing this case."

ARGUMENT.

We contend that the Court erred in granting the defendants' motion and in entering a decree dismissing our bill.

The motions presented several grounds for dismissal. They went in part to the jurisdiction of the Court, and in part to the merits of our cause of action.

It is our contention that none of the grounds referred to in the court's opinion, and none of the grounds stated in the motion to dismiss, justify the dismissal.

THE PLAINTIFFS, AS TAXPAYERS, HAVE A RIGHT TO MAINTAIN THIS ACTION.

Neither of the motions to dismiss challenge the right of the plaintiffs, as taxpayers, to maintain this action. However, the views expressed by the trial judge in his opinion, (Tr. pgs. 75 and 76), make it necessary to consider the question before taking up the several grounds of dismissal stated in the motions. The trial judge states in his opinion (Tr. pg. 73, par. 1), that "they, (the plaintiffs) assert that the suit is brought on behalf of the state, to protect it against the unconstitutional use of its funds, and an unconstitutional issue of bonds." And after explaining that the Fourteenth Amendment does not protect the state, as such, says, "it

necessarily results that plaintiffs in this suit represent only themselves," and (Tr. pg. 76), "it may be doubted whether taxpayers may maintain a suit against the state officials to vindicate the alleged rights of a state, * * * I can find no justification for extending the doctrines to actions against state officers."

The court's statement as to the capacity in which the plaintiffs bring this action, and the statement of what they claim, is wholly erroneous. The plaintiffs do not claim to represent the state, and they are not before the court as individuals. They bring this suit as taxpayers, and they represent the taxpayers of the state in this suit.

It has already been seen that this is strictly "a taxpayers' suit." The object of the action is to enjoin the unlawful diversion of public funds by the defendants and to enjoin them from issuing and negotiating bonds, and using the proceeds thereof for unlawful purposes, and to declare void, the constitutional amendments and legislative Acts which purport to authorize the things which they threaten to do. The bill of complaint alleges, (Tr. pg. 4), "that the plaintiffs bring this action as taxpayers, on behalf of themselves and on behalf of the other taxpayers of the state, who are many thousand in number, and who have a common and general interest in the questions presented in this case, and are so numerous as to make it impracticable to bring them all before the court."

The courts of this country whose function it is to see that there shall be no wrong without a remedy, have recognized and established by repeated decisions, the right of a taxpayer to challenge the validity of the acts of public officers which affect the general tax burden; and further, that one or more taxpayers may, on behalf of themselves and other taxpayers, challenge the validity of acts which affect the taxpayers generally. Manifestly, it is impossible for all taxpayers to join in such an action. In this case, forty-two taxpayers, a fairly representative number, are named in the bill as plaintiffs, suing on behalf of themselves and the other taxpayers of the state. They are scattered over the state and in its various counties. They allege that they "are many thousand in number * * * and are so numerous as to make it impracticable to bring them all before the court."

This is in harmony with the provisions of Rule 38 of the Rules of Practice of the Courts of Equity of the United States, 198 Fed. XXIX, which reads as follows:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The equitable principle embodied in this rule has been recognized in Courts of Equity both in England and in this country. In *Smith v. Swormsted*, 16 Howard, 298, 302, 303, the court sustained

the right of a number of superannuated Methodist ministers, as complainants, to prosecute a suit on behalf of themselves and all other ministers of the same class, to recover their share of a fund amounting to \$200,000. The Court said:

"The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; * * * In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

The rule is statutory in North Dakota. See Sec. 7406, Compiled Laws of North Dakota, 1913.

The reasons which sustain the right of a taxpayer to maintain such actions as this are discussed by Judge Dillon in

2 Dillon's Municipal Corporations, Third Edition, Sec. 914 to 922.

We quote from Sections 914 and 915 as follows:

"Sec. 914 (731). In this country, the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers, such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property * * * has been affirmed or recognized in numerous cases in many of the states. It is the prevailing doctrine on this subject. It can, perhaps, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct and adequate preventive relief against their abuse. It is better that those immediately affected by corporate abuses should be armed with the power to interfere directly in their own names than to compel them to rely upon the action of a distant state officer."

"Sec. 915. 'The doctrine of the preceding section is supported by an analogy supplied by the settled rule of law applicable to private corporations. In a private corporation the ultimate cestui que trust are the stockholders. In a municipal corporation the cestui que trust are the inhabitants embraced within its limits.'"

The rule thus stated by Judge Dillon was expressly approved by the United States Supreme Court in *Crampton v. Zabriskie* (1879) 101 U. S.

601. That case has been followed and quoted, without criticism, in both federal and state courts as the leading case upon the subject, and the rule there stated has become the settled law in this country.

In *Crampton v. Zabriskie*, *supra*, the court said:

"Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of the individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporations."

"The Liberty Bell," 23 Fed. 843, was decided upon the authority of *Crampton v. Zabriskie*. In that case, a taxpayer of New Orleans, but a citizen of France, sustained his bill against the City of New Orleans and prevented the use of public funds to pay junketing expenses connected with a return of the Liberty Bell to Philadelphia. We quote from the opinion:

"Resident taxpayers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of a municipal corporation or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay."

"There is no doubt that the said ordinance makes an appropriation of the funds of the City of New Orleans derived from taxation for purposes wholly beyond the purview of municipal government; is a wrongful appropriation of the *funds held in trust for the taxpayers* and people of New Orleans to pay the alimony and legitimate expense of the City; and is, in short ultra vires, illegal, null and void. See Acts La. 1882, No. 20, pp. 20. 21 Secs. 7, 8; 1 Dill. Corp. Sec. 52 et seq; *Hood v. Lynn*, 1 Allen, 103; *Tash v. Adams*, 10 Cush. 252; *Claffin v. Hopkinton*, 4 Gray, 502; *Murphy v. Jacksonville*, 18 Fla. 318; *Grant Co. v. Bradford*, 72 Ind. 455; *Henderson v. Covington*, 14 Bush, 312; *Cornell v. Guilford*, 1 Denio, 510; *Hodges v. Buffalo*, 2 Denio, 110; *Halstead v. Mayor, etc., of New York*, 3 N. Y. 433; *New London v. Brainard*, 22 Conn. 552."

"The illegality and nullity of the ordinance being clear, the question remaining for decision is as to the jurisdiction and propriety of an injunction in this particular case. 'In this country, the right of property-holders or taxable inhabitants to resort to equity to re-

strain municipal corporations and their officers from transcending their lawful powers, or violating their legal duties, in any mode which will injuriously affect the taxpayers,—such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property, under circumstances presently to be explained,—has been affirmed or recognized in numerous cases in many of the states. It is the prevailing doctrine on this subject. Dill. Mun. Corp. Sec. 731.”

“In *New London v. Brainard*, 22 Conn. 552, which was a case of injunction to restrain appropriation to celebrate the Fourth of July, the Supreme Court of Connecticut, in holding that a citizen and taxpayer is entitled to an injunction to restrain an illegal appropriation of the money of the city, said, in substance, that it is so because the city corporation holds its moneys for the corporators to be expended for legitimate corporate purposes; and a misappropriation of these funds is an injury to the taxpayer, for which no other remedy is so effectual or appropriate. See Dill. Sec. 732 et seq., for the many cases sustaining this doctrine.”

(The court then quotes from *Crampton v. Zabriskie*, the part we have already quoted).

In *Colorado Paving Co. v. Murphy*, C. C. A., 8th Ct., 78 Fed. 28, the court said:

“That taxpayers, whose taxes are to be increased and whose property is to be depreciated in value by the fraudulent or arbitrary violation of this provision (an ordinance requiring contracts to be let to lowest bidder), by the officers of a municipality, may maintain a bill to enjoin their proposed action, is

a proposition now too well settled to admit of question. Times Pub. Co. c. City of Everett (Wash.) 37 Pac. 695; 1 Beach, Pub. Corp. Secs. 634, 635; 2 Dill. Mun. Corp., Sec. 922; 2 High, Inj., Secs. 1251, 1253; Davis v. Mayor, etc., 1 Duer, 451; Crampton v. Zabriskie, 101 U. S. 601; Mayor, etc. v. Keyser, 72 Md. 106, 19 Atl. 706; People v. Dwyer, 90 N. Y. 402."

In Davenport v. Buffington, C. C. A. 8th Ct., 97 Fed. 234, the court held that:

"A resident and taxpayer of a city or town may maintain a suit in equity to prevent the diversion to private use by the original proprietor of the town site of land which, when the town was laid out and platted, was dedicated as a public park, and has since been maintained as such."

It was held in the above case that Tarrant, a general taxpayer, was a proper party to the action, and jurisdiction of the court was sustained upon that ground. We quote from pages 236 and 237:

"If these parks are appropriated to private use, he and his family will be deprived of their use to promote their health, recreation, and amusement. In short, the sale of the parks, and their use by the vendees for their private purposes, will deprive the appellee Tarrant of his share in the valuable right of the people to use them for park purposes, will deprive him and his family of a source of health, recreation, and amusement, and *will be very likely to increase the burden* of his taxation by compelling him to pay a part of the purchase price of other parks bought to replace those destroyed. Now, the enforcement of trusts is one of the great heads of equity jurisdiction. The land in these parks, if it was really dedicated to the use of the public for park purposes, is held in trust for that use, and courts

of equity always interfere at the suit of a cestui que trust or a cestui que use to prohibit a violation of the trust, or a destruction of the right of user. The appellee Tarrant is one of the cestui que use for whom these parks are held in trust, and the inevitable conclusion is that his interest in them is ample to enable him to maintain a suit in equity to prevent their diversion to private uses. Thus, in *Scofield v. School Dist.* 27 Conn. 499, it was held that a resident and taxpayer of the district had sufficient interest to enable him to maintain an injunction to prevent the use of the school house for religious services. The court very pertinently said that the value of the right of the district and its inhabitants to the exclusive use of the school house for school purposes was not to be measured by the mere pecuniary injury resulting from an infringement of the right. To the same effect is the decision of the supreme court of Kansas in *Spencer v. School Dist.*, 15 Kan. 259, in which the opinion was delivered by Judge Brewer. Indeed, under the modern decisions, the general rule is that a resident taxpayer of a municipality has sufficient interest, and has the right to maintain a bill to prevent the unlawful disposition of the money or property of his town or city, to forbid the illegal creation of a debt or liability of his municipality, and to restrain the diversion of money or property in his town or city from any public use in which he shares to which it has been dedicated. *Crampton v. Zabriskie*, 101 U. S. 601, 609; *Mayor, etc., v. Gill*, 31 Md. 375, 395; *Spencer v. School Dist.*, 15 Kan. 259; *Scofield v. School Dist.*, 27 Conn. 499; *Christopher v. Mayor, etc.*, 13 Barb. 567, 571; *Stuyvesant v. Pearsall*, 15 Barb. 244; *De Baun v. Mayor, etc.*, 16 Barb. 392; *Sharpless v. Mayor, etc.*, 21 Pa. St. 147, 158; *Moers v. City of Reading*, Id. 188; *City of New London v. Brainard*, 22 Conn. 552; *Merrill v. Plainfield*, 45 N. H. 126."

The right of taxpayers as such to maintain an action to have a proposed bond issue declared invalid was recognized without challenge by this court in *Brown v. Trousdale*, 138 U. S. 389. The rule as to the right of taxpayers to maintain a suit such as this, as stated and applied in *Crampton v. Zabriskie*, 101 U. S. 601, has, we believe, never been challenged or criticised.

See *Larrabee v. Dolley*, 175 Fed. 365, 386.

Quinton v. Equitable Investment Co., 196 Fed. 314.

Murray v. City of Alleghany, C. C. A. 3 Ct. 136 Fed. 57-61.

It is also quoted, with approval in Volume I, *Pomeroy's Equitable Remedies*, Sec. 344, and is further supported by a list of cases from thirty-one states, which have followed it, including North Dakota. So thoroughly is the rule established in North Dakota that in the recent "friendly case" *Green, et al., v. Frazier, et al.*, 176 N. W. 11, involving the validity of the legislative Acts which are attacked in the present action, and brought by only four taxpayers, all from the same County, and in which the defendants are the same State Officials who are named as defendants in the case at bar, and were represented by the same counsel, no question of the right of the four taxpayers to maintain that action on behalf of themselves and the other taxpayers of the State was raised. It seems hardly probable, therefore, that counsel for defendants in this action will challenge the right

of the forty-two taxpayers who are named as plaintiffs to maintain the same on behalf of the taxpayers of the State, or that they will undertake to support the objections urged by the trial judge in his opinion against the maintenance of the action against State officers. There is nothing in the grade of the officers who are attacked, which affects the right of the taxpayers to maintain their action. They have a right to maintain their action because they are taxpayers, and because defendants, under some pretended authority, threaten to do acts which will injuriously affect them as taxpayers.

Indeed, a taxpayer, because of his peculiar and personal interest, is the real party in interest in determining the validity of governmental action, and as such, has a superior standing because of that fact. This was illustrated in *Crawford v. Gilchrist* (Fla.) 59 So. 963, a case in which the Governor of Florida, in his capacity of a taxpayer, as well as Governor, enjoined the Secretary of State from certifying to the electors certain proposed amendments. On the subject of his right to maintain the action, the court said:

"A resident taxpayer has the right to enjoin the illegal creation of a debt which he, in common with other property holders and taxpayers, may otherwise be compelled to pay. *Peck v. Spencer*, 26 Fla. 23, 7 South. 642; *Lanier v. Padgett*, 18 Fla. 842; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070."

The Governor of the State, the Attorney General, and other officers of the State, who are named

as defendants are engaged in doing unlawful acts. The taxpayers of the State have, therefore, no redress at the hands of their regularly elected officers. On our theory of this case, the officers to whom they have delegated authority to protect them, have failed them. The taxpayers of the State are the real parties in interest because they are contributing and will contribute from their private funds all the moneys which are involved in the suit. To say that they cannot maintain an action under such circumstances is to say that they are without remedy, and must submit to any and all usurpations of authority by those who happen to hold official positions.

We will now consider the grounds of the Motions which attack the jurisdiction of the Court.

THIS ACTION IS NOT AGAINST THE STATE IN FORM OR EFFECT, AND THERE IS NO DEFECT OF PARTIES BECAUSE THE STATE IS NOT MADE A DEFENDANT.

In the motion for dismissal filed in the court below on behalf of certain of the defendants, and in the argument below on behalf of all of the defendants, it was contended that this action is against the sovereign state of North Dakota, and as the State cannot be sued without its consent, therefore the court was without jurisdiction and the action should be dismissed. We assume that the same claim will be made in this court. Upon this contention we desire to offer the following suggestions:

Whenever a public official, be he national, state or municipal, refuses to perform a duty imposed upon him by law, or attempts to act without authority of law, any person aggrieved may invoke the power of the court against such delinquent officer. Such an action cannot be considered as being against the governmental agency of which the defendant happens to be an officer. The official, in such case, is stripped of the dignity and power of his office, and acts simply as an individual without actual authority, but claiming pretended authority. He is a wrong-doer. His action or non-action, as the case may be, is unlawful. He thereby violates the rights of those whom he was selected to represent and protect, and an injunction is the proper remedy. The principles of law we are attempting to state are clearly illustrated in the case of *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. There the question was as to the legality of the action of the Postmaster General in forbidding to the plaintiff the use of the mails for transmitting letters advertising plaintiff's business. It was held that under the facts admitted in the record the Postmaster General had no authority under the law to make the order complained of. The Court said:

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts,

therefore, must have power in a proper proceeding to grant relief; otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the persons whose letters are withheld."

It was claimed that as the conduct of the post office is a part of the administrative department of the Government, the courts had no jurisdiction to grant relief to a party aggrieved by the action of the head or of the subordinate officials of that department, even though such action might be unauthorized by the statute under which he assumed to act. This contention was denied.

In the case at bar the plaintiffs claim that the constitutional amendment authorizing the State of North Dakota to engage in any private business which an individual might undertake, and tax the citizens of the state to defray the expenses of such private business is violative of the federal constitution. That the business provided for by the acts of the legislature complained of is private business, and that therefore these acts are in violation of the fourteenth amendment to the federal constitution. If under the issues in this action, as they now stand, our allegations must be accepted as true, and we claim that they stand admitted upon the record, then it clearly appears that the defendants, in their respective departments as alleged in the complaint, are acting and contemplate acting ille-

gally and without authority of law. They cannot claim that in what they are doing or intend doing they merely represent the State, or that they are in effect the State, and therefore immune from regulation by the courts. They stand as naked wrongdoers, stripped of their official authority and amenable in the courts to those whom their unlawful acts may injure. Of course, if our contention that the rights of the plaintiffs under the federal constitution would be violated if the defendants were permitted to operate under the amendment of the state constitution and statutory enactments set forth in the complaint is erroneous, and the State may lawfully engage in these various businesses and tax its citizens to maintain them, then the action must fail. That however, is a different question to that which we are now considering.

The question is never—what is the rank and station of the offending officers. The question always is—are the officers, who are charged with exceeding their authority, legally justified in what they are doing, or threatening to do. In such cases, the attack is not upon the State, or municipality, but is upon the acts of the officials, who under the apparent sanction of legislative or municipal authority, are doing or threatening to do, illegal acts.

It appears that the defendants, because of the official positions occupied by them, are charged with the carrying out of the program provided for in the acts of the legislature involved, and it is admitted that they will do their part unless enjoined by the Court. The governor, attorney general and

commisisoner of Agriculture and Labor, are designated in House Bill 17 as the "Industrial Commission," and as such are given general management, charge and supervision of the expenditure of funds in the inauguration and establishment of the business program proposed, and of the business after it has been started. (Tr. 3).

The defendants, Frazier, Langer, Olson and Hall constitute the "Auditing Board," and they are required to audit all bills and allow or disallow the same. (Tr. 2). This audit is required to be made before bills are paid. Defendant Olson as the State Treasurer, is custodian of all state funds, and is required to pay all bills presented to him which have been certified and approved for payment. (Tr. 3).

Defendant Kozitsky, as State Auditor, is required to prepare and draw warrants upon the State Treasurer for the payment of all moneys out of the state treasury. (Tr. 3). The defendants, Olson, as State Treasurer, Frazier, as Governor, Hall, as Secretary of State, and Kozitsky, as State Auditor, are required to prepare for issue, execute, issue, certify and attest the state bonds provided for in the various acts aggregating seventeen million dollars. These bonds are then to be delivered to the defendants constituting the "Industrial Commission" for negotiation and sale. (Tr. 31, 36, 44).

The defendant Frazier, as Governor, calls all meetings of the "Industrial Commission." He is made chairman of the "Industrial Commission." The defendant Langer, as Attorney General, is

made legal advisor of the "Industrial Commission." (Tr. 21).

The defendants, Frazier, as Governor, Langer as Attorney General, Kozitsky, as State Auditor, Olson, as State Treasurer, and Hagen, as Commissioner of Agriculture and Labor, constitute the State Board of Equalization, (Sec. 2141, Rev. Codes, N. D. 1913) and as such board are required annually to levy taxes sufficient to pay interest upon the seventeen million dollars of bonds authorized by the acts of the legislature involved in this case. (Tr. 33, 29 and 46). These bonds are to bear interest at a rate not exceeding six per cent per annum. (Tr. 31, 36, 44).

It will thus be seen that the taxpayers of the State may be required to contribute annually over a million dollars in interest alone, although there is further provision for the application of the profits, if any, of the business engaged in upon this interest obligation.

From this resume it appears that each and all of the present defendants, individually and in the respective official capacities in which they pretend and threaten to act, are concerned in the carrying out of the program provided for in these various acts, and they are each and all parties to the illegal transactions and expenditure of public funds raised by taxation complained of, and which the plaintiffs seek to prohibit. Therefore, according to our understanding, the case is brought squarely

within the principle laid down in the following decisions.

In the case of *Pennoyer v. McConnaughy*, 140 U. S. 1, the Court first referred to suits which would be considered as against the State, and then made a very clear statement with reference to suits which would not be considered against the State, saying:

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State."

This suit was against certain officers of the State of Oregon who comprised the Board of Land Commissioners of the State, to enjoin them from selling certain lands of the State which the plaintiff claimed title to. The defendants claimed the right to make sale under a statute of Oregon which the plaintiff claimed was not constitutional. Many prior decisions of the court were reviewed, and the Court said that:

"The general doctrine of *Osborn v. Bank*, 9 Wheat. 738, that the Circuit Courts will re-

strain a state officer from executing an unconstitutional statute of the state, when to execute it would violate the rights and privileges of the complainant which had been guaranteed by the Constitution, has never been departed from."

The doctrine of the last case cited was referred to with approval in the case of *Reagan v. Farmers Loan and Trust Co.*, 154 U. S. page 362. In this case the question of the validity of transportation rates was involved, and the action was brought against the officers of the State of Texas who were charged with the enforcement of the rates. It was held that the State had no such interest in the questions involved as would justify the holding that it was the real party in interest, the court saying:

"There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part."

In the case of *Smyth v. Ames*, 169 U. S. 466, the syllabus states:

"A suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of the Eleventh Amendment."

This was a suit to restrain the enforcement of alleged confiscatory transportation rates. The defendants were the state officers of Nebraska who had the duty of enforcing the rates under the laws of Nebraska.

The case of *M. K. & T. Ry. Co. v. Missouri Railroad and Warehouse Commissioners*, 183 U. S. 53, was, as the title indicates, against state officers of Missouri charged with the enforcement of transportation rates in Missouri. Removal of the case from the state to the federal court was contested upon the ground that the State of Missouri was the real defendant, but this contention was overruled.

The suit of *Scott v. Donald*, 165 U. S. 58, was against the defendants named as state constables of the State of South Carolina, to recover for the seizure and taking of certain liquors of the plaintiffs upon the ground that the law of South Carolina under which said seizure was made, was unconstitutional. The defendants claimed that inasmuch as they represented the State in making the seizure, the State was the real party in interest, and that the suit was against the State. The first

paragraph of the syllabus disposes of this claim as follows:

"Where a suit is brought against defendants who claim to act as officers of a state and under color of an unconstitutional statute commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, or for compensation for damages, such suit is not an action against the State within the meaning of the Eleventh Amendment to the Constitution of the United States."

In *Ex parte Young*, 209 U. S. 123, it appeared that the Attorney General of the State of Minnesota had been arrested for undertaking to enforce the penalties of a law that had been passed by the legislature fixing transportation rates, the enforcement of which had been enjoined in a suit against such officer. It was contended that the injunctive suit was in effect against the State, and without jurisdiction. This question was considered thoroughly and the decisions reviewed at great length. It would seem that the rule there enunciated is so plain that no question would again be raised upon a similar state of facts. The following quotation from the syllabus explains fully the conclusion reached by the court:

"The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to

its officer immunity from responsibility to the supreme authority of the United States."

Again:

"While making a state officer who has no connection with the enforcement of an act alleged to be unconstitutional a party defendant is merely making him a party as a representative of the State, and thereby amounts to making the State a party within the prohibition of the Eleventh Amendment, individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence an action, either civil or criminal, to enforce an unconstitutional statute, may be enjoined from so doing by a federal court."

The case of *Herndon v. Ry. Co.*, 218 U. S. 135, was against certain state officers as defendants to prevent them from attempting to enforce a statute of Missouri requiring trains to make certain stops, the claim being that the statute was unconstitutional. The court cited *Ex parte Young*, *supra*, and *Western Union Telegraph Co. v. Andrews*, 213 U. S. 165, as settling the question conclusively that the suit could not be considered as one against the State.

The case of *Philadelphia Co. v. Stimson*, Secretary of War of the United States, 223 U. S. 605, was to enjoin the defendant from causing criminal proceedings to be instituted against the plaintiff because of the reclamation and occupation of its land outside the prescribed limits. The plaintiff claimed in that case that the action of the defendant constituted the taking of its property for a

public use without compensation. While this contention was not sustained by the Court, the rule as to when a suit must be considered as brought against the sovereignty, and when it will be considered as being against officers of a sovereignty who are acting or who threaten to act beyond their authority, was clearly defined. It was there said:

"Exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. In case of injury threatened by illegal action, an officer of the United States cannot claim immunity from injunctive process. An officer transcending the limits of his authority under a constitutional statute may inflict similar injuries on property or individuals *as though he were proceeding under an unconstitutional statute, and in either event*, equity may intervene to restrain unfounded prosecution."

To the same effect see the case of Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U. S. 278, where it was said:

"One, whose rights protected by a provision of the federal constitution which is identical with the state constitution, are invaded by state officers claiming to act under a state statute, is not debarred from seeking relief in the Federal court under the Federal Constitution until after the state court has declared that the acts were authorized by the statute."

"Under the Fourteenth Amendment the Federal judicial power can redress the wrong done by a state officer misusing the authority of the State with which he is clothed; under such circumstances inquiry whether the State has authorized the wrong is irrelevant."

In the case of *Truax and the Attorney General of the State of Arizona v. Raich*, 239 U. S. 33, it is said that:

"A suit against officers of the State who are about to proceed wrongfully to complainant's injury in enforcing an unconstitutional statute is not a suit against the State within the meaning of the Eleventh Amendment. While, generally speaking, a court of equity has no jurisdiction over prosecution, punishment or pardon of crimes or misdemeanors, equity may, when such action is essential to the safeguarding of property rights, restrain criminal prosecutions under unconstitutional statutes."

The above suit involved the constitutionality of a statute of Arizona which provided that those employing more than five workers at one time, should employ not less than eighty per cent qualified electors or native-born citizens of the United States, and providing penalties for violation of the act. The suit was to restrain the prosecuting officers of the State from enforcing the law.

The case of *Little v. Tanner*, Attorney General of the State of Washington, 240 U. S. 369, was to enjoin the defendant from enforcing the statute of Washington imposing license tax upon the privilege of using profit-sharing coupons and trading stamps, upon the ground that the law interfered with and burdened interstate commerce, impaired the obligations of contract, denied equal protection of the law, and deprived the plaintiff of his property without due process of law. In the court below a motion was made to quash a temporary restraining

order that was issued, the defendant claiming exemption from suit on the ground that the same was against officers of the state to prevent them from enforcement of the criminal laws of the state, "and was therefore a suit against the State in violation of the Eleventh Amendment to the constitution of the United States." The lower court overruled this motion and on appeal to this court the ruling of the court below was approved.

In the case of *Greene, Auditor, et al., constituting the Board of Valuation and Assessment for the State of Kentucky, v. Louisville & Inter Urban Railway Company, et al.*, 244 U. S. 499, the rule sustained by the former decisions which we have cited was re-affirmed.

The latter decision was followed in the case of *Louisville & Nashville Railway Co. v. Greene, Auditor of Public Accounts, et al.*, individually and as constituting the Board of Valuation and Assessment for the State of Kentucky, 244 U. S. 522, the first paragraph of the syllabus in this case reading as follows:

"That the federal court has power to decide all questions, its jurisdiction being properly invoked on federal grounds; that this suit, to restrain subordinate state officers from enforcing an unlawful and discretionary assessment made under the color of a valid state law, is not a suit against the State."

The first two paragraphs of the syllabus in the case of *Greene, Auditor, et al., v. Ry. Co., supra*,

concisely states that ruling of the court. We quote the same:

"Equity has jurisdiction to enjoin unlawful tax proceedings, which cloud the plaintiff's title and threaten irreparable injury and a multiplicity of suits. The principle settled in *Ex parte Young*, 209 U. S. 123, to the effect that a suit to restrain state officials from enforcing an unconstitutional state statute in violation of plaintiff's rights and to his irreparable damage is not a suit against the State, applies also when the statute itself is constitutional, but the attempted administration of it is not."

In *Looney v. Crane Co.*, 245 U. S. 178, it was said:

"A suit to enjoin state officials from enforcing an unconstitutional tax is not a suit against the State."

In disposing of this question in the above case the Court used the following language:

"There is a contention to which we have hitherto postponed referring—that the court below was without jurisdiction because the suit against the state officers to enjoin them from enforcing the statute in the discharge of duties resting upon them was in substance and effect a suit against the State within the meaning of the Eleventh Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities."

In the case of *Johnson v. Lankford*, Bank Commissioner of Oklahoma, 245 U. S. 541, it was claimed that the suit must be considered as against the State. Recovery was sought for the loss of plaintiff's bank deposit, due to the failure of the Bank

Commissioner to safeguard the business and assets of the bank, and his arbitrary, capricious and discriminating refusal to pay the claim or allow it as against the State Guaranty Fund, all in continuous, negligent and wilful disregard of his duties under the state statute. The suit was held not to be against the State.

The case of *Martin v. Lankford, State Bank Commissioner of Oklahoma, et al.*, 245 U. S. 547, was similar to the prior case above referred to, and the same holding as to the suit not being against the State was made.

CASES RELIED UPON BY DEFENDANTS DISTINGUISHED.

The error of counsel for defendants in this case in claiming that the action must be considered as against the State of North Dakota, is due, we believe, to their failure to properly distinguish the authorities upon which they rely from the decisions of this court that are applicable to the facts in the case at bar. This distinction is clearly pointed out in the case of *Hopkins v. Clemson College*, 221 U. S. 636. The Court said:

"With the exception named in the constitution, every state has absolute immunity from suit. Without its consent it cannot be sued in any court by any person for any cause of action whatever. And looking through form to substance, the Eleventh Amendment has been held to apply, not only where the State is actually named as a party defendant on the record, but where the pro-

ceeding, though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights. * * * But immunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how can the principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual defendants whenever they interpose the shield of the State? The whole frame and scheme of the political institutions of this country, state and federal, protest against extending to any agent the sovereign's exemption from legal process. The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the State, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. But if it appeared that they proceeded under an unconstitutional statute their justification failed and their claim of immunity disappeared on the production of the void statute."

Even the Supreme Court of North Dakota, in *Green et al. v. Frazier*, 176 N. W. 11, has approved the right of taxpayers to bring suit against the same defendants as are designated in this action, in which suit the validity of the statutes here involved were *ostensibly* questioned. The case is that of *Green, et al., v. Frazier, as Governor, et al.*, already referred to.

One of the cases relied upon by counsel for defendants is that of *Louisiana v. Jumel*, 107 U. S. 711. In that case it appeared that the holders of certain state bonds sought to compel the state officers of Louisiana to pay the interest coupons, and that taxes had been levied and collected for such purpose. The plaintiffs in that action were not taxpayers and had no interest other than creditors of the State, and were simply seeking to compel the execution of a contract that had been entered into with the state. They had no authority to bring the suit against the State of Louisiana, and sought to compel specific performance of the contract by a suit against the general officers of the state. It was held that this could not be done. The distinction between such a case and the one at bar is obvious. Here we have certain individuals who are occupying and are given official positions and duties to perform under the acts of the legislature complained of. They are about to expend for illegal purposes the moneys collected by taxation and incur obligations which the taxpayers will have to meet in the future. No effort is being made in this action to compel the carrying out of a contract or

obligation imposed upon the State of North Dakota; on the contrary, the action is to prevent the officers named from wrongfully paying out moneys and contracting obligations which would be prejudicial to the State, but so far as the plaintiffs are concerned they are not basing their right to maintain this action because prejudice will result to the State. It is the damage that will accrue to the plaintiffs and those whom they represent, the taxpayers of the state, that constitutes the grounds for the relief asked,

In the case of *Cunningham v. Ry. Co.*, 109 U. S. 446, the situation was the same as in the case of *Louisiana v. Jumel*, *supra*.

To compel state officers to take affirmative action in behalf of or carrying out contracts or obligations of the State is an entirely different proposition to that of restraining individuals who occupy the position of state officials, from taking action under unconstitutional laws which will result in loss and dissipation of funds raised by taxation and which will result in the creation of obligations that will have to be met by taxation. The present action comes within the latter class of cases, and is to prevent, not to compel, action by state officials.

The case of *Belknap v. Schild*, et al., 161 U. S. 10, was for an infringement of letters patent granted by the United States for an improvement in caisson gates. It was alleged that the defendants,

officers of the United States Navy stationed in California, had manufactured and used, and intended to use caisson gates in carrying on the government business in violation of the rights of plaintiff. It was held that "Officers or agents of the United States, although acting under order of the United States, are personally liable to be sued for their own infringement of a patent." But it is quite clear that the court considered that the United States was the real party in interest and not the individual officers sued, because the property involved was owned by the United States and if it was being used in violation of the patent rights of plaintiff it was the United States who was the offender, not the naval officers who made incidental use of the property in the ordinary course of their duties. We call attention to the following language:

"In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States, and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire

interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defence and general welfare; and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited."

The facts in the foregoing case clearly distinguish it from the case at bar. The property involved was the absolute property of the United States. If acquired or used in violation of the plaintiff's rights the United States was the offending party. The case was similar to one that might be brought to determine title to real estate vested in the United States. In these circumstances administrative or executive officers cannot be named as defendants, and thus the objection that the suit is against the sovereign eliminated. In the case at bar, the money involved was raised by taxation against the plaintiffs and those whom plaintiffs represent, and they have a beneficial interest in the funds involved. The defendants are officers of the State charged with the carrying out of the provisions of the laws claim-

ed to be unconstitutional. It is universally held that taxpayers have the right to bring suit to enjoin the dissipation of funds raised by taxation, and such suit may properly be brought against the officers who are about to make the illegal expenditure. Again, in the present case it must always be borne in mind that plaintiffs seek to prevent the issuance of bonds aggregating large amounts, and which the taxpayers will be called upon to meet by future taxation.

The case of *International Postal Supply Company v. Bruce*, 194 U. S. 601, was a suit against a postmaster to prevent the use of a machine for cancelling stamps and postmarking letters, it being claimed that plaintiff was the owner of letters patent upon such machine. The machines had been hired by the Post Office Department for a term of years, not yet expired. It was held that the suit was in effect against the United States and could not be maintained. The United States was in this case, as in the last case referred to, the real party in title and interest. It was held that the case was governed by *Belknap v. Schild*, *supra*.

The case of *Oregon v. Hitchcock*, Secretary of the Interior of the United States, and William A. Richards, Commissioner of the General Land Office of the United States, 202 U. S. 60, was to restrain the defendants from allotting or patenting to Indians or other persons certain lands within the limits of the Klamath Reservation, which it is alleged were on March 12, 1860, swamp and over-

flowed lands, and asking a decree establishing the title of the State of Oregon to such lands, and declaring that the title to such lands was subject to such right of temporary and terminable occupation as may exist in the Indians at that time occupying the reservation, and not to be defeated by any allotment, patent, agreement, or other arrangement. The defendants claimed that the United States was the real party in interest, and it was held that—

“The fact that the action was brought by a State against the Secretary of the Interior, who is a citizen of a different State, does not give this court jurisdiction, as the real party in interest is the United States.”

It was further held that:

“It is not the province of a court to interfere with the administration of the Land Department, and until the land is patented, inquiry as to equitable rights comes within the cognizance of the department and the courts will not anticipate its action.”

The court called attention to the fact that the title to all the land was in the United States Government. It is apparent that there could be no lawful adjudication with reference to the title to this property without the real owner, the United States, being a party to the action. In such a case it would be a mere subterfuge to permit an action to be brought against officials of the United States.

The case of *Wells v. Roper*, First Assistant Postmaster General, 246 U. S. 335, involved rights under a contract by whom the plaintiff was to furnish automobiles for handling the mail at Washington.

The contract contained a clause authorizing cancellation upon ninety days' notice. Notice of cancellation was given and the action was brought to restrain the annulling of the contract and require performance of the same. It was held to be a suit against the government and not maintainable. That the effect would be to oblige the United States to accept continued performance of the contract, and directly interfere with one of the processes of government. It was held that the bill of complaint showed that the defendant was without personal interest, was acting solely in his official capacity and within the scope of his duties. That it could not be claimed that any question of defendant's official authority was involved. The question was whether or not the contract, which the defendant in his official capacity undertook to cancel, could be enforced, and whether the United States was liable for a breach thereof.

It will be noted that in the motion to dismiss the point is also made that there has been a non-joinder of parties defendant, in that the State is the real party in interest and has not and cannot be joined. The contention has, we believe, been fully met and answered by the authorities which we have already cited upon the right of the plaintiffs to maintain this action. If the action is maintainable against the officers named, and is not in effect a suit against the State, then of course it must follow that the State is not a necessary party.

THIS CASE ARISES UNDER THE CONSTITUTION OF
THE UNITED STATES.

One ground of the Attorney General's attack upon the court's jurisdiction is the following:

(Tr. pg. 68 (b).) "The bill of complaint fails to show that the matter in controversy, or cause of action, alleged herein, arises under the laws or constitution of the United States."

All of the parties to this action are residents of the State of North Dakota. The jurisdiction of the court rests upon Section 24 of the Judicial Code. So far as material, it reads as follows:

"Sec. 24. The District Court shall have original jurisdiction as follows: First. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States * * *."

As applied to this case, this section requires three things to establish jurisdiction: (1) the suit must be "of a civil nature at common law or in equity." (2) "The matter in controversy" in the suit must exceed, exclusive of interest and costs, the sum or value of three thousand dollars. (3) The matters in controversy must arise under the Constitution or laws of the United States.

We are now dealing with the question of the jurisdiction only. The question here is not, whether our claim shall be sustained. The question is, whether we shall be heard,—in other words, do we

present a claim which is fairly debatable, or is our claim so frivolous and groundless that we should not be given a hearing. The rule which is applicable is stated by this court in *Illinois Central Railroad v. Chicago*, 176 U. S. 646, 656, as follows:

"In determining the existence of a Federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit."

See also:

Walsh v. Columbus, etc., Railroad Co., 176 U. S. 469-475-476.

The plaintiff taxpayers present in their bill three claims under the Federal Constitution.

First: The bill alleges that the appropriation and use of the tax funds of the State, and the issuance of State bonds, and the use of the proceeds thereof for the purposes stated in the seven legislative Acts in question, violate the fundamental rights of the plaintiffs, as citizens of a free government. (Tr. page 11.) To show that this claim has merit, we rely upon *Loan Association v. Topeka*, 20 Wallace, 665, in which bonds issued under legislative authority, in aid of an industrial enterprise and not for public purposes, were held void, without referring to any specific provision of the Federal Constitution. We quote from this case:

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which

recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism.. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." The Court held that, "Among these is the limitation of the right of taxation, that it can only be used in the aid of a public object, an object which is within the purposes for which governments are established."

The above case was followed by others, none of them referring to the Fourteenth Amendment.

Cole v. La Grange, 113 U. S. 1.

Parkersburg v. Brown, 106 U. S. 487.

Burlington Twp. v. Beasley, 94 U. S. 310.

Blair v. County, 111 U. S. 363

Osborne v. Adams County, 106 U. S. 181.

Osborne v. Adams County, 109 U. S. 1.

See also:

Dodge v. Township, C. C. A. 8th Ct., 107 Fed. 827.

Beach vs. Bradstreet, 82 Atl. 1030 and cases cited.

Second: We also claim that these plaintiffs will be denied the protection of Section 4, Article 4 of the United States Constitution which guarantees to each state, a Republican form of government. We contend that the program established by the two amendments to the State Constitution, and the seven legislative Acts here in question, is not the Republican form of government guaranteed by the Federal Constitution. In support of this claim, we quote from Beach v. Bradstreet, Conn. (1912) 82 Atl. 1030:

"A Republican form of government forbids the raising of taxes for any but public purposes, and under Section 4, Article 4, of the Constitution of the United States, Connecticut is forever bound to maintain such form of government, and cannot exercise legislative power inconsistent with it."

And on the strength of this conclusion, the court held that "A Republican form of government forbids the raising of taxes for any but public purposes."

Pacific States Tel. Co. v. Oregon, 223 U. S. (1911), 118, is referred to as settling the question that the section of the Constitution, which guarantees a Republican form of government presents

a political question only which is solely cognizable by Congress, and not a judicial question. It is true, in that case the question was a political one. However, the court pointed out, on Page 150 of the opinion that the attack made upon the law was not made by those who had been denied any constitutional rights, and said: "If such questions had been raised they would have been justiciable and therefore would have required the calling into operation of judicial power." The attack was addressed to the framework and political character of the State government. Whether the case at bar can be distinguished is not important for, clearly, the plaintiffs have the same right of protection under the Fourteenth Amendment.

Third: We also contend, and this is our chief contention, that the Constitutional amendments and legislative Acts here in question are void under the Fourteenth Amendment to the Federal Constitution, which so far as relevant, reads as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person, within its jurisdiction, the equal protection of the laws;"

Our bill shows that under the pretended authority of the Legislative Acts in question, the property of plaintiffs and the other taxpayers of the State

is being taken, and will be taken under the guise of taxation, for private and business purposes. Such a taking is without due process of law. It is the settled law of this country that the right of taxation can only be used in aid of a public object,—an object which is within the purposes for which governments are established. This will be fully discussed elsewhere. To show that our claim has substantial merit and is not frivolous, we cite:

Loan Association v. Topeka, 20 Wallace, 655;
Dodge v. Township, C. C. A. 8th Ct. 107 Fed.
827.

Lowell v. Boston (1873), 111 Mass. 453; 15
Am. Rept. 39.

Allen v. Jay (1872), 60 Maine, 124; 11 Am.
Rept. 185.

In Re: Opinion of Justices (1910) Mass. 98
N. E. 611.

It was not contended in the lower court, and probably will not be contended here that the case does not rise under the Federal Constitution. Further, the trial Judge, although he held against our contention upon the merits, treated it as arising under the Fourteenth Amendment.

THE MATTER IN CONTROVERSY EXCEEDS THE SUM OR VALUE OF \$3,000, EXCLUSIVE OF INTEREST AND COSTS.

The Attorney General's Motion further urged :

(Tr. pg. 68 (c)), "The bill of complaint fails to show that the interests of any of the plaintiffs in the matter in controversy exceeds in value the sum of Three Thousand Dollars, and shows that the plaintiffs form a class of parties who have relations to the common fund sought to be administered."

The foregoing presents an objection to the court's jurisdiction only indirectly. It does not make the direct challenge that the sum or value of the matter in controversy does not exceed the sum of \$3,000, exclusive of interest and costs. The language of Section 24 of the Judicial Code is very plain on this element of jurisdiction. That Section gives jurisdiction "where the matter in controversy exceeds exclusive of interest and costs, the sum or value of \$3,000."

The question in every case is, what is the "matter in controversy," and does it exceed the sum or value of \$3,000. This question in this case must be answered by an examination of the allegations of the Bill.

The bill alleges :

(Tr. Pgs. 3 and 4, Par. 8) "That the plaintiffs and other taxpayers of the state of North Dakota are the beneficial owners, subject to the legal and proper use thereof by the State of North Dakota for state purposes, of all moneys

and funds now in the treasury of the State of North Dakota, collected by taxation for the purpose of defraying the expenses of the government of the state, and which funds are held and controlled by the defendants, as officers of the state, as hereinbefore described. That said funds are held in trust by the defendants in their official capacity for the plaintiffs and other taxpayers of the state. That said funds now amount to more than three hundred thousand dollars."

"The bill further alleges:

(Tr. Pg.4. Par. 9) that the suit, "involving the sum of money, exclusive of interest and costs, a sum or value in excess of \$300,000. of moneys now in the treasury of the State of North Dakota, derived from taxation of property and persons in said state, and \$17,000,000 in bonds of the State of North Dakota, to be issued as hereinbefore set forth, which said bonds, if permitted to issue, create a charge upon the property of the State of North Dakota, which must be met by the taxation of the people of and property of said state; and that each of the matters in controversy in this action, exceeds, exclusive of interest and costs, the sum or value of ten thousand dollars."

The plaintiffs, speaking for the taxpayers of North Dakota, claim in this action that the provisions of the constitutional amendments which are set out in the bill are void to the extent that they authorize the state to go into business generally, and in the particular business described in the several legislative acts in question; further, that each of these seven legislative acts are void, and they ask to have the amendments and legislative acts so judged to be void. They also ask that the bonds

which are authorized by said acts to be adjudged void, and that the defendants be restrained from paying out the moneys appropriated by the several acts.

We submit that the matters in controversy in this action are the seven legislative acts and the two constitutional amendments, and the proposed bond issues authorized by the said acts; further that the sum or value of the matters in controversy is the amount of the appropriations and the bond issues. Measured in terms of money, these are the amounts which are directly affected by the decree. As the case stands, the decree of the trial court sustains these appropriations and the bond issues. The appropriations and the bond issues represent the amount which will be added to the burden of the taxpayers of North Dakota, if the decree is sustained.

What do the defendants claim? Their claim is that the several acts in question do not violate the Federal Constitution and that they are valid and fully justify the defendants in doing the several acts which the plaintiffs seek to enjoin.

It is clear if the plaintiffs' contentions are sustained in full, each of the several legislative acts which we attack, including the several appropriations and the authorization for the \$17,000,000 in bond issues will be declared void; and the two constitutional amendments will be sustained or restricted according to the court's views.

If plaintiffs' contentions are sustained as to only a part,—that is, as to one or more of the acts, our relief will be confined to the act or acts which are held void, but even in that event, the "amount in controversy" will sustain the court's jurisdiction, for in each act, the amount in controversy is in excess of the amount required to establish jurisdiction. The decree will necessarily affect the public moneys in the Treasury which amount to over \$300,000, and the proposed bond issues aggregating \$17,000,000.

If our contentions are sustained, the \$300,000 in the Treasury will be used for governmental purposes; and if they are overruled, it will be expended under the provisions of the legislative acts which we attack. So, too, in the case of the bonds, if our contentions are sustained, they will not create a State indebtedness; if we are overruled, they will create a State indebtedness, and become a legal obligation on the taxpayers of the State.

The case at bar belongs to the class of cases which are represented by *Brown v. Trousdale*, 138 U. S. 389. That case, like this, was strictly a taxpayer's suit. The plaintiffs in that case, as in this case, sued as taxpayers on behalf of the other taxpayers of the taxing jurisdiction. The purpose of their action was to have a county bond issue of \$400,000 declared void. The same question as to the amount in controversy, which is involved in this case, was raised and presented in that case, and the court held that the matter in dispute was

the bond issue. We quote from the opinion as follows:

"The main question at issue was the *validity of the bonds* and that involved the levy and collection of taxes for a series of years to pay interest thereon and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."

The rule stated in the above case was quoted and applied in *Northern Pacific Railway Company v. Pacific Coast Lumber Manufacturers' Association*, C. C. A. 9th Ct. 165 Fed. 1-11, and was quoted in *Risley v. City of Utica*, C. C. A. 8th Ct., 168 Fed. 737. It was also quoted understandingly, and without criticism in *Wheless v. City of St. Louis*, 96 Fed. 865-869.

In *Northern Pacific Railway Company v. Pacific Coast Lumber Mfg. Co.*, supra, a number of corporations and persons joined in a suit to enjoin the Northern Pacific Railway Company from putting into effect a new schedule of rates. On the question of the matter in controversy, we quote from Page 11 of the opinion.

Objection is made to the jurisdiction on the ground that it does not appear from the bill that the necessary jurisdictional amount is in controversy. The bill alleges that the matter in controversy exceeds, exclusive of interest and costs, the sum and value of \$2,000. In *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, it was held that a suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction unless the facts appear upon the record to create a legal certainty of that conclusion. In *Lee v. Watson*, 1 Wall. 339, 17 L. Ed. 557, it was said: By 'matter in dispute' is meant the subject of the litigation—the matter for which the suit is brought and upon which issue is joined, and relation to which jurors are called and witnesses examined. The matter in dispute in the present suit is the right of appellants to enforce a proposed schedule of rates. *Railroad Co. v. Ward*, 2 Black, 485, 17 L. Ed. 311. In principle the case is similar to *Washington Market Co. v. Hoffman*, 101 U. S. 118, 25 L. Ed. 782, a suit in which a number of complainants whose several interests did not equal the jurisdictional amount sought to enjoin the market company from interfering with their right to occupy their respective stalls. The court said:—'The case is one of two hundred and six complainants suing jointly. The decree is a single one in favor of them all and in denial of the

right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable.' In *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987, the complainants were taxpayers who sought to restrain the collection of interest and principal on bonds alleged to have been unlawfully issued by the county. The court said: 'The rule applicable to plaintiffs each claiming under a separate and distinct right in respect to a separate and distinct liability and that contested by the adverse party is not applicable here.' So in *City of Ottuma v. City Water Supply*, 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604, in a suit by a taxpayer to enjoin the city from issuing bonds, it was held that the power of the city to issue such bonds is the matter in dispute for the purpose of ascertaining the amount or value in controversy, and not the tax to which the complainant would be subjected. Other cases in point are *Texas & P. Ry. Co. v. Kuteman*, 54 Fed. 548, 4 C. C. A. 503; *American Fisheries Co. v. Lennen* (C. C.) 118 Fed. 869."

In *City of Ottuma v. City Water Supply*, C. C. A. 219, 59 L. R. A. 604, 119 Fed. 315, it was held:

"In a suit by a taxpayer to enjoin a city from issuing bonds, claimed to be in excess of the constitutional limit of its indebtedness, the power of the city to issue such bonds is the matter in dispute for the purpose of determining whether the amount or value in controversy is sufficient to give a federal court jurisdiction, and not the tax to which complainant would be subjected."

That case was prosecuted by a single property owner and taxpayer to invalidate a contract for water works. The court stated that the records showed that the plaintiff would be injured in an

amount sufficient to sustain jurisdiction, but nevertheless held that the matter in dispute was the power of the City to make the contract and issue bonds. We quote:

"But the city of Ottuma was about to enter into the proposed contract for the erection of waterworks, and issue and negotiate bonds of the city as proposed to the amount of \$398,900 to procure money to pay for the same. Complainant contends that the city, being already indebted beyond the constitutional limit, has no right or power to enter into such contract or issue such bonds. Whether it has or has not such power to issue and negotiate that large amount of bonds is certainly the matter in dispute in this suit, brought to restrain and prohibit the city from taking such action. *Johnson v. City of Pittsburg*, (C. C.) 106 Fed. 753; *Rainey v. Herbert*, 5 C. C. A. 183, 55 Fed. 443; *Market Co. v. Hoffman*, 101 U. S. 112; 25 L. Ed. 782; *Railroad Co. v. Ward*, 2 Black, 485; 17 L. Ed. 311; *Stinson v. Donsman*, 20 How. 461, 15 L. Ed. 966; *Scott v. Donald*, 165, U. S. 107, 114, 17 Sup. Ct. 262, 41 L. Ed. 648."

Johnson v. City of Pittsburg, 106 Fed. 753, which was an action in equity in the Federal Court by a taxpayer to enjoin the city of Pittsburg from making a contract and from paying moneys thereunder, and asking that the contract be surrendered for cancellation, it was claimed that the jurisdictional amount was not involved; that the complainant's property was worth only \$3500; that the contract of sale was less than \$300,000, and that the total valuation of the city's property was \$270,000,000 for which reason the plaintiff's taxes, when levied, could not amount to \$2,000. The court,

making through Buffington, Judge, overruled this objection, holding that the value of the contract was not the amount of the tax, was the sum or amount in controversy. We quote the following from the opinion in this case:

"It will thus be noted the only question now before us is one of jurisdiction,—whether the requisite jurisdictional amount is involved. After careful consideration we are of opinion this plea must be overruled. The bill does not seek to enjoin the levy of a proposed tax, or restrain collection on one levied. True, it is averred complainant is a property owner and taxpayer; but this is evidently done to show he is not an intermeddler, and on the theory that such facts give him a standing to file a bill to question the legality of the contract. If the prayers of the bill were granted on final hearing the asphalt company would be deprived of a contract far in excess of the required jurisdictional sum. If this asphalt company was a respondent in a bill filed in a state court, the prayer of which was to strike down such a contract, manifestly its right of removal to a Federal court, if otherwise proper, could not be denied by reason of the allegation that the matter in controversy was the amount of taxes the complainant would have to pay if the contract were performed. The principle applicable to the present case is set forth in *Mayor, etc. of Baltimore v. Postal Tel. Co.* (C. C.) 62 Fed. 500, where it is said:

'It is true that where a bill in equity is filed to abolish a nuisance, or to set aside a deed, or for a decree giving other mandatory or preliminary relief, it is the value of the property of which the defendant may be deprived by the decree sought which is the test of jurisdiction, and not the claim of the complainant.'

This principle underlies *Market Co. v. Hoffman*, 101, U. S. 113, 25 L. Ed. 782, where the value of the right, the exercise of which was

enjoined, was held to be the test of jurisdiction; *Railroad Co. v. Ward*, 2 Black 485, 17 L. Ed. 311, where, in a bill to abate a public nuisance, it was held the value of the obstruction, and not the damage to the plaintiff, was the matter in controversy; *Stinson v. Dousman*, 20 How. 461, 15 L. Ed. 966, where it was held the title to the land, and not the rent sued for, was the matter in controversy; *Rainey v. Herbert*, 3 U. S. App. 600, 5 C. C. A. 183, 55 Fed. 443, where, on a bill to abate a private nuisance the value of the respondent's use of a projected coking plant, the use of which was sought to be enjoined, was held to be the matter in controversy and to sustain jurisdiction; *Whitman v. Hubbell* (C. C.), 30 Fed. 81, where, on a question of jurisdiction, it was said 'The matter in dispute is the value of the right to maintain the awning, not the amount of damage done by it to the plaintiff.' To these may be added *Dickinson v. Trust Co.* (C. C.) 64 Fed. 895; *Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.* (C. C.) 43 Fed. 547; *Symonds v. Greene* (C. C.) 28 Fed. 834. The plea is overruled with leave to the respondents to answer within 30 days."

In *Davies v. Corbin*, 112 U. S. 36, a writ of mandamus was sought on behalf of several persons who held judgments against Chicot County, to compel the levying of a ten mill tax to pay the several judgments. None of the judgments in amount, equaled the jurisdictional amount. A motion to dismiss on jurisdictional grounds was presented. The court on this point said:

"The second objection is, to our minds, equally untenable. The writ which has been ordered in this case is not like that in *Hawley vs. Fairbanks*, 108 U. S. 543, to compel the levy of taxes to pay separate and distinct judgments in favor of several relators, who, for

convenience and to save expense, united in one suit to enforce their respective rights, but to compel a tax collector to collect a single tax which has been levied for the joint benefit of all the relators, and in which they have a common and undivided interest. As in the cases of *Shields v. Thomas*, 17 How. 3, 5 and the *Connemara*, 103 U. S. 754, all the relators claim under one and the same title, to wit: the levy of a tax which has been made for their benefit. They have a common interest in the tax, and it is perfectly immaterial to the tax collector how it is divided among them. He has no controversy with them on that point; and if there is any difficulty as to the proportions in which they are to share the proceeds of his collections, the dispute will be among themselves and not with him. He cannot act upon separate instructions from the several creditors. His duty is to collect the tax for the benefit of all alike. A payment of the judgment of one creditor would not relieve him from his obligation to collect the whole tax. The object of the proceeding is, not to raise the sums due the relators but to raise the whole tax on ten mills on the dollar. As the matter stands, each relator has the right to have the whole tax collected for the purpose of distribution among all the creditors. It is apparent therefore, that the dispute is between the tax collector on one side and all the creditors on the other, as to his duty to collect the tax as a whole for division among them, after the collection is made, according to their several shares. The value of the matter in dispute is measured by the whole amount of the tax, and by the separate parts into which it is to be divided when collected. It is conceded that the amount of the tax is more than \$5,000."

In *Troy Bank v. Whitehead & Company*, 222 U. S. 39, several persons who held notes secured

by a single vendor's lien united to enforce it. No one of them had a sufficient amount involved to give jurisdiction. A motion to dismiss was granted. This was reversed by the Supreme Court. We quote the following from the opinion of Judge Van Deventer:

"By the demurrer to the bill the defendant challenged the jurisdiction of the Circuit Court, upon the ground that the matter in dispute was not of the requisite jurisdictional value; and the court, being of opinion that such value was not to be measured by the extent to which the plaintiffs collectively were seeking to enforce the lien as a common security, but by extent to which each was interested in its enforcement, sustained the demurrer and dismissed the bill for want of jurisdiction. 148 Fed. Rep. 932. The plaintiffs then appealed directly to this court and the Circuit Court appropriately certified the question of jurisdiction. Act. of March 3, 1891, C. 517, pp. 5, 26 Stat. 826.

When two or more plaintiffs, having separate demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Shields v. Thomas*, 17 How. 3; *Rodd v. Heartt*, 17 Wall. 354; *Davies v. Corbin*, 112 U. S. 36, 40; *Gibson v. Shufeldt*, 122 U. S. 27; *New Orleans Pacific Railway Co. v. Parker*, 143 U. S. 42; *Walter v. Northeastern Railroad Co.*, 147 U. S. 370, 373; *Davis v. Schwartz*, 155 U. S. 631, 647; *Illinois Central Railroad Co. v. Adams*, 180 U. S. 28."

The present suit is of the latter class. Its controlling object—that which makes it cognizable in equity—is the enforcement of the

vendor's lien, which is a single thing or equity in which the plaintiffs have a common and undivided interest, and which neither can enforce in the absence of the other. Thus, while their claim under the notes were separate and distinct, their claim under the vendor's lien was single and undivided, and the lien was sought to be enforced as a common security for the payment of both notes."

Berryman v. Whitman College, 222 U. S. 334, (1912), was an action to enjoin a tax from which the complainant claimed to be exempt under a contract with the territory of Washington, the amount of the tax was less than the jurisdictional amount; the court held that the tax which was described was not the matter in issue but on the contrary, that it was the contract right to tax exemption; that jurisdiction must be measured by the value of the right to be protected and sustained jurisdiction. Holt v. Ind. Mfg. Co., 176 U. S. 68 and five other cases were cited, in support of the challenge of jurisdiction. On page 348, this court said:

"We state, in margin, the cases principally relied upon to support the contention as to the want of jurisdiction. It would suffice to say of these cases that if they supported the proposition which they are cited to maintain, they have been qualified and restricted by the cases which we have just reviewed."

In Humes v. City of Ft. Smith, 93 Fed. 857, it was held that "the amount involved in a suit for an injunction for the purpose of determining the jurisdiction of a federal court, is the value of the

right to be protected or the extent of the injury to be prevented by the injunction."

The principle which was applied in *Brown v. Trousdale* antedated that case by many years.

In *M. & M. Ry. Co. v. Ward*, 2 Black 485, 67 U. S. 485, which was an action in equity by James Ward, an owner and operator of steam boats, to enjoin, by a suit in the United States District Court, the building of a bridge across the Mississippi River on the ground that it was a nuisance, the court held that its jurisdiction was to be tested by the value of the object to be obtained, which was the removal of the nuisance and was not to be determined by the damages sustained by the complainant.

In *Shields v. Thomas*, 17 Howard 3; 21 U. S. 335, the court, through Chief Justice Taine, overruled a motion to dismiss on the ground that the sum in controversy was less than \$2,000. The court held that the matter in controversy was the sum due to the representatives of the deceased collectively. It was the entire sum which was in dispute.

In *Market Co. v. Hoffman*, 101 U. S. 112, two hundred and five occupants of market stalls were complainants asking an injunction in favor of each and a decree establishing their right to occupy their stalls. We quote from the opinion:

"The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon

this we have no doubt. While it may be true, that if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or the company, the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable. It is averred under oath in the pleadings that the sale which the company proposed to make, and the court below enjoined, would have realized to the company more than \$60,000. Of this benefit the decree deprives them. It is very plain, therefore, that the appeal is one within our jurisdiction."

In the "Conemara" 103 U. S. 754, which was a suit to recover for a single salvage service, the amount of the recovery was \$14,198, which, upon being divided among the parties entitled thereto, would give each less than \$5,000, the jurisdictional amount. The court sustained jurisdiction, holding that

"The matter in controversy was the amount due the salvors collectively and not the particular sum to which each was entitled when the amount due was distributed among them."

The same principle was applied in the "Mamie" 105, U. S. 773.

In *Estes v. Gunter*, 21 U. S. 183, which was an action in equity to enjoin a sale under attachment and to have an assignment declared invalid, it was held, on motion to dismiss, on the ground that the claim was not sufficient to give jurisdiction,

that the court had jurisdiction, the suit being brought not simply to defeat the attachment, but to establish the assignment and make it available.

Colvin v. Jacksonville, 185, U. S. 456 belongs to a different class of cases. It belongs to the class in which the main purpose of the plaintiff's suit is to protect his individual interest and prevent damage to himself. This was a suit to enjoin the issuance of a million dollars worth of bonds by the City of Jacksonville. The opinion is by Chief Justice Fuller, who also wrote the opinion in *Brown v. Trousdale*. In this case the plaintiff, in his bill, alleged the taxes which would be assessed upon his property, because of these bonds, would exceed \$2,000. Issue was taken by answer, upon the amount of the burden which would be cast upon the plaintiff because of the bonds. The court found that it would not exceed \$2,000. The plaintiff placed the amount of his liability in issue. The Supreme Court was bound by the record which was certified to it. The court held that the jurisdiction was not established, placing the case in the category of *El Paso Water Co. v. El Paso*, *infra* and concluded that it was the amount of interest of complainants which was in issue and not the entire issue of bonds. In closing its opinion, the court restated the rule which it had laid down and applied in *Brown v. Trousdale* evidently to make it clear that the case, then being decided, did not come under the rule in that case. This case makes clear the distinction upon which we rely. We quote at length from his opinion.

"We are confined in the disposition of the case to the certificate, from which it appears that the case was heard upon a motion for an injunction and for the appointment of a receiver, on the bill and amended bill, answer and affidavits. And that the court found as matter of fact that the entire amount of taxes which complainant would be obliged to pay as interest and sinking fund on account of the proposed issue of bonds would not exceed \$2,000, and thereupon dismissed the bill for want of jurisdiction. It was contended by complainant that the amount of taxes he would have to pay was not the amount in controversy, but that the total amount of the issue of bonds was. But this contention was overruled, and if the court did not err in that particular, and assuming as we must, that complainant's liability did not exceed \$2,000, the decree of the court was right, since it was its duty, when it appeared to its satisfaction that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, to proceed no farther, and to dismiss the case. *Morris v. Gilmer*, 129 U. S. 315. This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount of controversy, and, in respect of that, we have no doubt the ruling of the Circuit Court was correct. In *El Paso Water Company v. El Paso*, 152 U. S. 157, 159, which was a bill filed by the water company against the City of El Paso, for an injunction, it was alleged, among other things, that if certain bonds were issued, the complainant would be compelled to pay taxes on its property for the interest on the bonds and to provide a sinking fund for the principal thereof, but the amount of the tax that would be thereby cast upon complainant's property was not disclosed, and we said upon the question whether there was a sufficient amount in

controversy to give this court jurisdiction: 'The bill is filed by the plaintiff to protect its individual interest, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of \$5,000. So far as respects the matter of taxes which, by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred.' The case is in point and is decisive.

Brown v. Trousdale, 138 U. S. 389, 394, is not to the contrary. There several hundred taxpayers of a county in Kentucky for themselves and others, associated with them, numbering about twelve hundred, and for and on behalf of all other taxpayers in the county, 'and for the benefit likewise of said county,' filed their bill of complaint against the county authorities and certain funding officers, and all the holders of the bonds, seeking a decree adjudging the invalidity of two series of bonds aggregating many hundred thousand dollars, and perpetually enjoining their collection; and an injunction was also asked incidental to the principal relief against the collection of a particular tax levied to meet the interest on the bonds. The leading question here was whether the case had been properly removed from the state court, and no consideration was given to the case upon the merits. As to the jurisdiction of this court, we said: 'The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon; and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the in-

terest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of *appelles* in in that regard.' "

All of the cases cited by the trial Judge in support of his views in this case are of the class of *Colvin v. Jacksonville*.

In *Green v. L. & I. Ry. Co.*, 244 U. S., 499-508 the plaintiffs sought relief from certain assessments.

In *Orleans Kenner Electric Ry. Co. v. Dunbar*, 218 Fed. 344-346, the sole purpose of that suit was to protect the original plaintiff's individual interests and to prevent damage to him * * *."

In *Cowell v. City Water Supply Co.*, 121 Fed. 53, the purpose of the suit was to protect the plaintiff's interest in specific property and the value of his interest was less than the jurisdictional amount.

In *Risley v. Utica*, 168 Fed. 737, the object of the suit was to restrain and cancel a tax which had been levied against the plaintiff.

In *Wheless v. City of St. Louis*, 96 Fed. 865, affirmed, 180 U. S. 379, a number of lot owners joined as complainants to restrain assessments against their lots. The assessment against no one of the complainants equalled the jurisdictional amount. The court held that the amounts could not be aggregated, and that that case came under the principle which governs cases where complainants sue to protect their individual interests, and did not come under the rule of *Brown v. Trousdale* and similar cases. The Court of Appeals, speaking through Judge Adams, and referring to these cases, page 869, said :

"Counsel for complainants rely specially upon the cases of *Davies v. Corbin*, 112 U. S. 36, 5 Supt. Ct. 4, and *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308. Concerning the first of these cases, it appears that the chief justice, who wrote the opinion, in reaching a conclusion found and held that all the relators claim under one and the same title, namely, the levy of taxes already made expressly for their benefit, and therefore that they, and each and all of the relators, have a common interest in the tax; and, inasmuch as it was immaterial to the collector whether he paid it to one or another of the complainants, the chief justice properly classifies this case with those of *Shields v. Thomas*, *supra*, and other cases in which aggregation of claims may be made for jurisdictional purposes. In the other of the cases so relied upon the chief justice, in delivering the opinion of the court, *properly stated* that the main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay the interest thereon, and finally the principal thereof, and not the mere restraining of

a tax for a single year, and for this reason held that the rule applicable to complainants each claiming under a separate and distinct right in respect to a separate and distinct liability contested by the adverse party was not applicable to that case."

In *Rogers v. Hennepin County*, 239 U. S. 621, the complaints' suit was for an injunction to prevent the collection of an assessment of \$40 imposed against each complainant. The matters in controversy being severable, could not be aggregated to create jurisdiction.

There is no conflict between *Brown v. Trousdale* and the cases which are in harmony therewith, and the case of *Colvin v. Jacksonville*, and the cases which belong to that class; and neither case, so far as we are able to learn, has been criticised, or overruled.

In the case at bar, plaintiffs represent all of the taxpayers of the State. They have a common and joint interest in the funds in the Treasury, and in preventing their diversion to unlawful purposes, and in preventing the issuance of the bonds in question which will create a burden which will be a common one to all the taxpayers. The trial Judge erred in concluding, (Tr. Pg. 73) "that plaintiffs in this suit represent only themselves." We have shown, and it will probably be conceded, that they represent all of the taxpayers of the state. His statement, (Tr. Pg. 74, Fol. 101), that the present suit is "in all its aspects" a suit "to enjoin a threatened tax levy" is also erroneous. The

court apparently failed to distinguish the two classes of cases which are represented by *Brown v. Trousdale* and *Colvin v. Jacksonville*, and because of this, concluded that *Brown v. Trousdale* had been overruled and contained an erroneous statement of the law, and that *Colvin v. Jacksonville* represented the correct and only method of determining the amount in controversy for jurisdictional purposes.

The matters in controversy in this action, are the two constitutional amendments and the seven legislative acts. The sum or value thereof which will be directly affected by the decree is the amount of the appropriations and bonds.

THE COURT HAS JURISDICTION OF THE SUBJECT
MATTER OF THIS ACTION.

The second ground of the Motion to Dismiss, by special counsel, (Tr. pgs. 53, 68), is as follows:

"Because it appears in the complaint filed in this cause that this Honorable Court has no jurisdiction of the subject matter of the pretended cause of action set forth in said complaint."

This ground was not urged in the lower court, and is not referred to by the trial judge, in his opinion.

In *Cooper v. Reynolds*, 10 Wallace, 308, 316, this Court said: "By jurisdiction over the subject matter is meant, the nature of the cause of action and of the relief sought." It is sufficient to say that

this is an action in equity, and the trial court has jurisdiction in actions in equity by Section 24 of the Judicial Code; further that the relief sought is such as is commonly granted by courts of equity.

THE BILL OF COMPLAINT STATES A MERITORIOUS CAUSE OF ACTION WHICH UNDER THE VIEW MOST FAVORABLE TO APPELLEES REQUIRES AN ANSWER AND A TRIAL UPON THE MERITS.

The trial judge, in the opinion filed in the Court below, speaks of the merits of the case under the designation "the other jurisdictional element" (Tr. 76); however, in the order allowing appeal it is stated that

"For the purpose of removing any doubt as to the scope of the decree, the court adds that in passing upon the question whether the bill presents a case arising under the Federal Constitution, the court passed and intended to pass on the merits." (Tr. 84).

In presenting that question and before entering upon an analysis of the Legislation involved, we deem it proper to first consider some of the general rules of law applicable to the facts and conditions as presented to the court. In discussing the questions involved it is to be expected that we may deal with some questions that seem elementary or have been already settled, but we desire to approach the analysis of the Legislation under con-

sideration along an avenue set with sign posts leading to a definition in general terms of "public use" as contemplated when speaking of the purpose for which taxes may be raised, that will have the sanction and approval of this court, and if we can demonstrate, as we believe we can, that taxes raised for the purposes involved in the so-called economic program of the North Dakota Legislature, do not come within the definition so approved, then we ask for the judgment of this court sustaining our Bill.

It will be urged on behalf of the appellees that the state is supreme, that the rule suggested by the trial judge in the quotation from the opinion in *McCulloch v. Maryland*, 4 Wheaton 316, is the rule that should govern here, viz: that in the matter of taxation the only security against the abuse of the power of taxation on the part of the state is found in the structure of a government itself. (Tr. 77).

We fail to see where the rule carries any comfort to the appellants when they attempt to justify the appropriation of private property through the form of taxation for the purpose of entering upon private business, for if we are correct in our judgment, the structure of the government itself prevents such appropriation.

Section 14 of the Constitution of North Dakota provides:—

"Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, etc."

Similar statutory provisions have been construed, and, it has always been held that the Constitutional provision that private property shall not be taken, destroyed or damaged for public use without just compensation therefor, carries with it the inevitable inference that private property shall not, under any circumstances, be taken for private use without the consent of the owner, and that even the sovereign power of the state cannot take private property for public use without first making full and adequate compensation therefor.

Minnesota Canal & Power Co. v. Koochiching County, 97 Minn. 429; 107 N. W. 405.

Brown v. Gerald, 100 Me. 351; 61 Atl. 785.

It is so well recognized that for the state to take the property of one man for the benefit of another, which is the result of taking private property for any but public use, is not a constitutional exercise of the power of the government, that citation of authority seems quite unnecessary.

As Chief Justice Waite expressed it in *Munn v. Illinois*, 94 U. S. 113, the 14th Amendment was adopted as a guarantee against any encroachment upon an acknowledged right of citizenship by the Legislature of the state. In other words, the rule has been always, as expressed by this court time and again, and by the state courts time without number, that

“The use for which private property is to be taken must be a public one, whether the taking

be by the exercise of the right of eminent domain or by that of taxation."

Cole v. La Grange, 113 U. S. 1.

Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; (161) 41 L. Ed. 369 (389).

In fact it has been by this court

"Established beyond cavil, that there can be no lawful tax which is not laid for a public purpose."

Loan Assn. v. Topeka, 20 Wall. 655 (659),
22 L. Ed. 455.

Jones v. Portland, 245 U. S. 217.

In *Fanning v. D. M. Osborne & Co.*, 102 N. Y. 441; 7 N. E. 307, (309) the court of appeals in speaking of a franchise that had been granted to a street railway company and the use thereof contracted to *Osborne & Co.*, said:—

"The right to construct and operate a street railway is a franchise which must have its source in the sovereign power. The legislative power over the subject is also subject to the limitation that the franchise must be granted for public, and not for private purposes, etc. * * * It is plainly contrary to public policy that a franchise granted for public purposes should be used as a mere cover for a private enterprise."

We submit that the same rule must apply in the matter of the appropriation of property by taxation, that accepting the rule as established that private property cannot be taken for a private enterprise without the consent of the owner, then we have the corollary that property cannot be appro-

priated even in the name of the state as a mere cover for a private enterprise.

In the court below it was argued that the adoption of the constitutional amendments and the passage of the acts involved amounted to a declaration on the part of the state and the legislature that the purposes for which the money was to be raised were public, particularly was this urged with respect to the legislative enactments.

While the trial judge did not express his views in as broad terms as the argument of the counsel for appellees, yet in his opinion it is suggested that the legislative enactment should be a controlling factor of great power in determining the question. (Tr. 78, folio 107).

In this connection we desire to call attention to Amended § 185 of the State Constitution, (Tr. 6) from which it will be seen that the constitution, or rather the amendment to the constitution, does not in any way refer to the industries, enterprises, or businesses there permitted, as being public or of a public nature. Let us quote:—

“The state, any county or city may make internal improvements and may engage in any industry, enterprise or business not prohibited, etc.”

It was the apparent purpose of the framers of the amendment, as submitted and adopted, to frame a constitutional provision broad enough in its terms to permit the state, or county, or city, to engage in private business enterprises.

Without quoting from the legislative acts in-

volved, we would simply call the attention of the court to the fact that the Industrial Commission Act, (Tr. 21) contains, nowhere, a provision in any manner designating any of the business enterprises over which it is placed, as public in character, while the powers given to the commission are even greater than those generally accorded the Board of Directors of a private corporation.

Neither do any of the other acts involved contain any provision or declaration of public use or purpose. (See Bank of North Dakota Act, Tr. 24) (Bank of North Dakota Bond Act, Tr. 31) (North Dakota Real Estate Bond Act, Tr. 35) (Mill & Elevator Association Act, Tr. 40). In connection with this particular act we would call the attention of the court to a provision of § 2 (Tr. 40) wherein it is said:—

“The business of the Association, in addition to other matters herein specified, may include anything that any private individual or corporation may lawfully do in conducting a similar business, etc.”

Mill & Elevator Association Bond Act,
(Tr. 43) and Home Building Act (Tr.
48).

The question as to whether a given object is public or private is a judicial one. A Legislature cannot make a private purpose a public one by its mere fiat.

Dodge v. Mission Township, 107 Fed. 827
(829).

Brown v. Gerald, 100 Me. 351; 61 Atl. 785.

A declaration by the legislature might be urged as indicative of the sentiment of the members of the law-making body of the state, but in the instant case there is no such declaration. There evidently was no intention on the part of the managers and framers of the program, to claim a public purpose or a public use. The constitutional amendments as well as the legislative enactments, passed thereunder, each and all were framed with the idea that the state might enter upon private business enterprises, and establish and maintain the same by taxation.

PUBLIC OWNERSHIP DOES NOT CHANGE THE CHARACTER OF A BUSINESS.

It may be urged in this court that the mere fact that the state enters into a business makes of it a public business and a public use. Such suggestion was made in the court below but we did not understand at the time that it was urged with any confidence.

We do not understand how a business can be specially affected in its character by the agency through which it is conducted. A grocery business is a grocery business even though carried on by a practicing physician. A meat market is a meat market and has all of the incidents of a meat market even though it may be owned and carried on by a tailor. Any kind of mercantile or trading business retains its individual characteristics and

remains the same character of business whether carried on by a private individual, by a city, or by a state. There are certain rights of the individual to be protected, among which is the right to secure, control, possess and use property without interference, except where the same must be taken for a public use and then it cannot be taken until full compensation is paid.

It is not the policy of the law to permit the rights of the individual to be infringed upon through subterfuge. His personal rights are to be protected whether the attempt at invasion is by an individual, a private or a public corporation, by the state, or even by the national government. We are unable to point out any court decision having this particular point directly involved, but we believe the rule as laid down by Mr. Justice Marshall in *United States v. Planters Bank of Georgia*, 9 Wheaton, 904 (1807), 6 L. Ed. 244, and which has been from time to time, referred to, not in its entirety, but in different phases, to be the rule today. We quote:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs . . . to the business which is to be transacted."

It can make no difference whether the government is a partner or is carrying on the business individually. The same rule, it would seem, must apply.

THE POSITION OF PLAINTIFFS BEFORE THIS COURT.

While it is true that there exists a presumption in favor of laws imposing taxes, and also true that the courts will assume the constitutionality of legislative acts until the contrary is shown, yet when the question is raised the courts cannot, in the proper discharge of the duties imposed upon them, shirk or evade the responsibility of passing squarely upon the question.

To say that the mere enactment of a statute by the legislature can make the subject public is to say that the legislature can validate its own act. Such argument would leave the courts without power to pass upon the constitutionality of any act of the legislature.

To say that the finding of the state court upon a question of public use is binding upon this court is to deprive the citizen of an opportunity to have the question of the invasion of the rights, guaranteed to him by the Federal Constitution, passed upon by the courts that are organized for the purpose of protecting such rights and upholding the provisions of the Federal Constitution.

Reference has already been made to the language of Chief Justice Marshall in *McCulloch v. Maryland*, and much stress will, of course, be placed

upon the opinion filed by the trial judge as well as the recent decision of the Supreme Court of North Dakota of which we speak elsewhere.

We submit, however, that while the utterances of these courts are entitled to, and will, receive proper consideration at the hands of this court, yet the question of public use is one that is squarely before this court and must be passed upon according to the facts presented and not according to the views expressed by either the trial judge or the judges of the State Supreme Court which may have been colored by the particular brand of political economy upon which these acts are grounded.

The purpose of the 14th Amendment was to limit the power of the states. Previous to its adoption there was a limitation upon the power of the general government by the 5th Amendment, but with no corresponding limitation upon the state. If we look into the history of constitution making in this country we discover that from the beginning there has been an increasing tendency to limit the power of the different state governments in the matter of taxation. During the period from 1776 to 1796 in some 22 constitutions adopted less than half of them contained any statement of importance relating to taxation. However, Massachusetts, new Hampshire and Vermont safe-guarded their people with somewhat similar provisions to those contained in the Pennsylvania constitution which provided:—

“No public tax, custom or contribution, shall be imposed upon, or paid by the people

of his state, except by a law for that purpose: And before any law be made for raising it, the purpose for which any tax is to be raised ought to appear clearly to the legislature to be of more service to the community than the money would be, if not collected; which being well observed, taxes can never be burdens."

From 1796 to 1834 in the neighborhood of 15 constitutions were adopted by the people of the different states, and while the limiting clauses were not contained in the very great majority of them, yet the idea was evidently more in favor than during the previous periods.

During the period, however, from 1834 to 1869 we find that more than three fourths of the constitutions adopted contained provisions generally fixing the kind of property that was taxable and a statement of principles and rules governing assessments and taxation, and from 1860 to 1890 there seemed to be a more decided advance upon the subject of limitations of taxing power. In 1868 the 14th amendment was adopted by which a limit was put upon the power of the state.

The rule, however, requiring that taxes should be levied for a public purpose did not come into being with the 14th Amendment. The fundamental principle that taxes can be levied only for public purposes had been declared in some of the state courts long before the adoption of the 14th amendment, and irrespective of any express constitutional declaration. That amendment simply protected the citizen by a federal constitutional enactment against enthusiastic legislation on the part of the

state and enabled the citizen to invoke the Federal Constitution for protection when private rights were invaded or threatened by legislation, the result of the vagaries of sociological dreamers.

If, in determining the right of the citizen, the act of the state legislature, or the decision of the state supreme court is to govern, then the 14th amendment becomes innocuous, and is but a "scrap of paper."

In *McCoy v. Union Elevated Railway Company*, 247 U. S. 354 (363) ; 62 L. Ed. 1156 (1165), in a case dealing with the question of the appropriation of private property through eminent domain this court said that it could examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation, and if the necessary result was to deprive him of property without such compensation then due process of law was denied him and this, contrary to the 14th amendment, with the result, of course, that this court would take cognizance and pass upon the rights.

In *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U. S. 226, (237), 41 L. Ed. 979 (985) this court having before it the question of appropriation of private property for a public purpose without compensation, which is on principle on a parity with the taking of private prop-

erty for private purpose, and one in the same manner as the other, a violation of the provisions of the 14th amendment, held the right of the court to examine into the proceedings, not alone of the legislature, but of the court of the state, and among other things announced the same rule contended for above, that if a state could make anything due process of law simply by its own legislation, simply by declaring it such, that the prohibition to the state was of no avail, or had no application where the invasion of private right was affected under the forms of state legislation. The court further announced the rule that the prohibitions of the 14th amendment extended to all acts of the state, whether through its legislative, its executive or its judicial authority, and quoting with approval from *Loan Association v. Topeka*, 20 Wall. 655, *supra*, said:—

“The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.”

Again this court in *C., B. & Q. R. Co. v. Chicago*, *supra*, said:

“In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or un-

der its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

This court, in the last case cited, quotes from *Scott v. Toledo*, 36 Fed, 385:—

"In *Scott v. Toledo*, 36 Fed. Rep. 385; 395-396, the late Mr. Justice Jackson, while circuit judge, had occasion to consider this question. After full consideration that able judge said: 'Whatever may have been the power of the states on this subject prior to the adoption of the 14th amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment."

The question to be determined is whether the rights of the citizens complaining and of those for

whom they stand in representative capacity are being or are about to be invaded by the legislative enactments complained of. In this case the plaintiffs and appellants complain, not only of the result that is to follow the putting into effect of the acts, but complain of the acts themselves; and complain that their rights under the Federal Constitution are being invaded. We say in the language of this court in *McCulloch v. Maryland*, 4 Wheaton, 316, (426) that

"The great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them."

Hence it is immaterial what the Legislature of North Dakota may have done, or what the Supreme Court of North Dakota may have said. The question now is, what are the facts as presented by this record, and what are the rights of these plaintiffs and those whom they represent? To paraphrase the language of the late Justice Brewer when, as a circuit judge, he wrote the opinion in *McElroy v. Kansas City*, 21 Federal 257 (260) we say that today in these days when the power of the state is pressed to such an extent and when the urgency of so-called public purposes rest as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own.

Political disturbances and emotional action on the part of the people is very apt to bring about radical legislation accompanied by lax construction of what is a public purpose. Therefore, the question is one that should be determined by the court upon its own investigation and according to its own judgment upon the record as presented.

WHAT IS A PUBLIC PURPOSE?

Before taking up a discussion of the particular legislation involved in this action it is important that we should, if possible, settle upon some rule by which to determine what is a public purpose, establish some line on one side of which will fall those activities which are public, and on the other, those which are private. In determining that question, and in establishing such a line, we must give consideration to the opinions of states as well as Federal Courts, and we desire at this time to refer briefly to the expression of some of the courts before whom this question has been discussed.

(1850) In *Northern Liberties v. St. John's Church*, 13 Penn. St. 104, the Court said:—

“We think the common mind has everywhere taken in the understanding that taxes are public impositions levied by authority of the government for the purpose of carrying on the government in all its machinery and operation, that they are imposed for a public purpose.”

(1870) In *People v. Salem*, 20 Mich. 452, (474-475, 483-484, 488), the Supreme Court of that state speaking through Judge Cooley, among other things said:—

“Taxation is a mode of raising revenue for public purposes only, and, as is said in some of the cases, when it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder. * * * I do not understand that the word ‘public,’ when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the legislature from taking broad views of state interest, necessity or policy, or from giving those views effect by means of the public revenues. * * *

When we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and that in many cases it has little or nothing to do with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects for which the state imposes, taxes upon its citizens, the question is always one of mere policy, and if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but because on the whole it is deemed best for the public authorities that they should be. On the other hand certain things of absolute necessity to civilized society the state is precluded, either by express constitutional provisions, or by necessary implication, from providing for at all; and they are left wholly to the fostering care of private enterprise and private liberality. * * *

By common consent also a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply. It

is this in its natural operation, and without the interference of the government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the government is not tolerated, because, though it might be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term 'public purpose,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality. * * * The incidental benefit which any enterprise may bring to the public, has never been recognized as sufficient of itself to bring the object within the sphere of taxation."

(1874) In *Citizens Savings & Loan Assn. v. Topeka*, 20 Wall. 655 (668, 667), 22 L. Ed. 455 (462, 461) this Court in an opinion written by Mr. Justice Miller, laid down certain rules and principles with respect to taxation for public purposes that established the law and has been cited and quoted from, more than any other case upon the subject.

There was no attempt to expressly designate and itemize such businesses as might become public, but the general principles were enunciated and are as controlling today as then.

In expressing the rule to govern the courts in determining whether a given use was a public use or not, it is said that they must be:

"Governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of lawful taxation."

The provision in the rule that whatever is considered necessary to the maintenance of good government is a principle broad enough to cover every use that has been sanctioned by this court.

In speaking further, however, of particular matters, the court in the Topeka case said:—

"If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions."

In this same case, in speaking of the limitation upon the power of the State Legislature, to tax the people for a private purpose, the Court said:—

"It must be conceded that there are such rights in every free government beyond the

control of the state. A government which recognizes no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. * * * The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere."

(1892) In re House Bill # 519, Opinion of the Justices of the Supreme Judicial Court of Massachusetts, 155 Mass. 598; 30 N. E. 1142, (1146) opinion given May 7th, 1892, Mr. Justice Barker said:—

"It is not within the constitutional power of the state to engage in trade or manufacture merely for the purpose of having any branch of business conducted upon a convenient or economical plan. * * * The legislature has no constitutional right to create agencies for the (private business) purpose. It has no right to authorize towns and cities to engage in trade merely to try an experiment in practical economics or to put in practice a theory."

(1901) In Dodge v. Mission Township, 107 Fed. 827, (828, 830) in a decision handed down by the Circuit Court of Appeals for the 8th Circuit, Judge Sanborn in writing the opinion said:—

"It is a fundamental principle of a republican form of government that no man shall be involuntarily deprived of his life, liberty, or property without due process of law. The prohibition of such a deprivation by the states is found in the fourteenth amendment to the Con-

stitution of the United States. But it lies deeper, and limits and conditions every grant of legislative, executive, or judicial authority. The proposition was announced in the early history of the republic and it has been constantly affirmed. The Supreme Court said in *Calder v. Bull*, 3 Dall. 386 (388) 1 L. Ed. 648, (649) 'A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B,—it is against all reason and justice for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it.' A legislative act which takes, or undertakes to authorize the taking, of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law but an arbitrary decree, whereby the property of one citizen may be transferred to another. * * * Speaking generally, a public purpose is a governmental purpose, one of the purposes for which governments are instituted and maintained among men, such as the maintenance of order, the prevention and punishment of crime, the care of highways, the relief of the destitute, the education of the youth, the erection of buildings for the use of schools and of the officers of the government; while a private object is one which is ordinarily sought and attained by individuals or private associations of individuals, such as the cultivation of the soil, the manufacture of useful and attractive articles, the purchase and sale of merchandise, and the thousand and one purposes which enlist individual enterprise and energy in a complex and advancing civilization."

(1905) In *Brown v. Gerald*, 100 Me. 351; 6 Atl. 793, (794) the Court said:—

“That only can be considered a public use where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty, perhaps impossibility, of making provisions for them otherwise, is alike proper, useful, and needful for the government to provide. * * * Property is devoted to a public use when, and only when the use is one which the public in its organized capacity, to wit, the state, has a right to create and maintain, and therefore one which all the public has a right to demand and share in. * * * In a broad sense it is the right in the public to an actual use, and not to an incidental benefit.”

(1905) In *Clark v. Nash*, 198 U. S. 361 (369), 49 L. Ed. 1085 (1088) an action involving the condemnation of a right of way in favor of an individual land owner across his neighbor's land in the State of Utah. This court put its seal of approval upon the rule that the number involved was not a test as to whether a certain act was for a public purpose or not, and while it was held a public purpose to obtain water for the land of one man in this particular case, there were circumstances and conditions surrounding the case that do not appear in the instant case.

In the course of the opinion the Court said:—

“But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the

public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

(1912) In *Beach v. Bradstreet*, 85 Conn. 344; 82 Atl. 1030 (1932), the court said:—

"The test of the Act before us is: Will it serve a recognized object of government, and will it directly promote the welfare of the people of the state in equal measure?"

(1913) In *State v. Lynch*, 88 Ohio St. 31; 102 N. E. 670 (673) the court said:—

"The functions of the state are governmental only, except so far as proprietary rights may become incident to the exercise of the primary function."

(1914) In *Union Ice & Coal Co. v. Town of Ruston*, 135 La. 898; 66 So. 262, the court said:—

"The question is not whether the thing can be done economically or not, but whether the doing of it falls within the legitimate functions of municipal government. The fact that shoes and ready made clothing could be manufactured more cheaply by the municipality in connection with its public utilities would not justify the town in going into the shoes and clothes business. * * * By common consent a large portion of the most urgent needs of society are relegated exclusively to the law

of demand and supplies. * * * Trade is not and cannot properly be regarded as one of the functions of government. On the contrary its function is to protect the citizens in the exercise of any lawful employment."

(1914) In *Laughlin v. Portland*, 111 Me. 488; 90 Atl. 318 (320-321) the court said:—

"The exact line of cleavage between what is, and what is not, a public use, is somewhat difficult to mark. Some purposes readily align themselves on one side of the line as being clearly public in their nature, while others as readily fall on the other side as being obviously private, and there is a debatable ground between the two. * * * The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes, because it would be impossible to do so. * * * In general it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot successfully be dealt with without the aid of powers derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others, as well as himself, should possess and enjoy them."

In that particular case the question was decided upon the principle that the difficulty in obtaining an adequate supply of a necessary commodity furnished a reason for the supplying of the commodity by the municipality and made it a public use.

(1917) In *Jones v. Portland*, 245 U. S. 217 (223, 224) ; 62 L. Ed. 252, (255, 256) this court had before it a case similar to that of *Laughlin v. Port-*

land, *supra*, and in passing upon the right of the city to establish and maintain a permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants, this court quoted with approval the language of the Supreme Court of Maine in *Laughlin v. Portland*, wherein it was said:—

“The vital and essential element is the character of the service rendered, and not the means by which it is rendered.”

Again this Court quotes:—

“But it is urged, why, if the city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store or a meat market or a bakery. The answer has been already indicated. Such kinds of business do not measure up to either of the accepted tests.”

The tests referred to were given in *Laughlin v. Portland*, as follows:—

“First, the subject matter, or commodity, must be one of public necessity, convenience, or welfare. The second test is the difficulty which individuals have in providing it for themselves.”

Passing on this the court in *Jones v. Portland* quotes further from *Laughlin v. Portland* as follows:—

“The purpose of the act is neither to embark in business for the sake of direct profits nor for the sake of the indirect gains that may result to purchasers through reduction in price by government competition. It is simply to enable the citizens to be supplied with something which is necessity in its absolute sense

to the enjoyment of life and health, which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole."

Political economists have taken their turn in an effort to formulate some definition of public use that would fit all cases, but without avail, for it is of such a character that it is necessary that each case should stand upon its own bottom. It has been suggested by some that in determining whether a certain use falls upon one side or the other of the line, attention must incessantly be urged that neither the state nor any of its subdivisions can engage in industry without justifying every specific enterprise by unquestioned evidence of its public expediency, and that even then it remains to be shown that such an enterprise can have any claim except in temporary and provisional manner upon taxation as a source of revenue.

It is impossible to lay down any hard and fast rule by which to gauge public use, but it seems to be clearly in the mind of all judges and law writers that to justify a public tax the use for which the tax is raised must be

First: Governmental, and

Second: For a public purpose.

A careful review of the cases, and an earnest effort to determine a general rule that will protect the individual rights and at the same time have sufficient flexibility to enable the state or division

thereof to properly discharge its duty, leads us to suggest that in determining whether the purpose for which the tax is levied is public, the courts must consider:

(a) Whether it is one of those purposes that readily fall on the public side of the line, such as support of schools, relief of paupers, maintenance of highways, and other municipal acts that have by a long course of conduct, become thoroughly recognized as public purposes, in which are included the furnishing of water, light and heat, or

(b) Whether the government is supplying its own needs or its furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare, which, on account of their peculiar character, and the difficulty, or perhaps impossibility of making provision for them otherwise, is alike proper, useful and needful for the government to provide. And in determining that question the court should be influenced by the need of the particular community for the proposed innovation; by the ability of private enterprise to supply the needs; by the availability of private capital; by the general condition of the community, and whether the service rendered is so rendered to the people as a relief measure and will protect the public welfare in equal measure, and at cost or approximatly so, but

(c) If the benefits to the public are to be incidental, if the state or division thereof is entering

into trade merely to try an experiment in practical economics, or to put into practice a theory, if the business enterprise is being entered upon simply that some commodity may be furnished to that portion of the community using that commodity at a cheaper price, or if the enterprise is being entered upon for the purpose of enhancing the value of some particular raw material, then it is merely a trade, a private business, and cannot be supported by a public tax.

CERTAIN PRIVATE RIGHTS INALIENABLE.

In *Jones v. Portland*, *supra*, this court quoted with apparent approval from *Laughlin v. Portland*, wherein the rule is laid down that the principle that municipalities, which necessarily includes the state, can neither invade private liberty nor encroach upon the field of private enterprise, should be strictly maintained as it is one of the main foundations of our prosperity and success.

Certain rights to which all men are inherently entitled, were, however, by the Constitution of North Dakota, especially safe-guarded. In Article 1, being the Declaration of Rights, at Section 1, it is provided:—

“All men are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness.”

In the same article at § 14 it is provided:—

“Private property shall not be taken or damaged for public use without just compensation having been first made, etc.”

Under the rule already referred to that the inclusion of the prohibition against taking private property for public use without just compensation, necessarily excludes the idea of taking private property for private use under any consideration without the consent of the owner, together with the declaration of the rights to acquire, possess and protect property, carries with it unquestionably the intent of the constitution framers of North Dakota to protect the citizen in these rights, and in order to show how thoroughly such rights were to be protected § 24 of Article 1 was enacted, as follows:—

“To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”

Thus it is taken out of the power of the majority of the people to interfere with the rights of the individual thus accorded by constitutional provision, and under the rule of the constitution of North Dakota, under the rule enunciated by state courts and by this court, we submit that neither the fact that a great many people benefit by an enterprise to be established, or that the enterprise is desired or voted for, or is approved by a great many people, can make the use of the money contrib-

uted to that particular enterprise by taxation, a public use, for while a social compact is a covenant by which the whole people covenant with each citizen, and each citizen with the whole people, that all should be governed by certain laws for the common good, this does not confer power upon the people to control rights which are purely and exclusively private. These are reserved rights and are inalienable.

Munn v. Illinois, 94 U. S. 113; 24 L. Ed. 77.

LEGISLATION INVOLVED.

We desire now to take up, for discussion, the legislation involved in this action in order that we may determine on which side of the line these particular legislative enactments fall, and as a preliminary to that discussion we desire to present the legislative enactments separately and in abstract form, but presenting in this brief and argument what we consider the controlling features.

INDUSTRIAL COMMISSION ACT.

House Bill No. 17. (Tr. 21-24.)

The title to the act reads as follows:

"An Act, creating the Industrial Commission of North Dakota, authorizing it to conduct and manage on behalf of the state certain utilities, industries, enterprises, and business projects, and defining its powers and duties;

and making an appropriation therefor." (Tr. 21.)

§ 1 of the Act provides:

"A Commission is hereby created and established to conduct and manage, on behalf of the State of North Dakota, certain utilities, industries, enterprises and business projects, now or hereafter established by law. It shall be known as The Industrial Commission of North Dakota, but may be designated as The Industrial Commission." (Tr. 21.)

Subsequent provisions of the act fix the membership of the Commission, describe its general powers and duties.

Under § 5 the Commission is empowered and directed to

"Manage, operate, control and govern all utilities, enterprises and business projects, now or hereafter established, owned, undertaken, administered or operated by the State of North Dakota, except those carried on in penal, charitable or educational institutions. To that end it shall have the power, in the exercise of its sound judgment, and is hereby directed:

(a) To determine the locations of such utilities, industries, enterprises and business projects. (Tr. 22.)

(b) To acquire by purchase, lease or THE RIGHT OF EMINENT DOMAIN ALL NECESSARY PROPERTIES AND PROPERTY RIGHTS TO CONSTRUCT BUILDINGS, ETC., for any or all of the industries. (Tr. 22.)

(e) To fix the buying price of things bought, and the selling price of things sold, incidental to the said utilities, industries, enterprises and business projects, and to fix rates and charges

for any and all services rendered thereby having in mind the accumulation of a fund with which to replace in the general funds of the state the amount received by the Commission under appropriation made by this act, or as may be directed by the legislative assembly. (Tr. 23.)

(g) To procure the necessary funds for such utilities, industries, enterprises and business projects by negotiating the bonds of the State of North Dakota, in such amounts and in such manner as may be provided by law." (Tr. 23.)

\$200,000.00 of the general funds of the State of North Dakota is by this Act appropriated for the purpose of carrying out the provisions of the Act, and that sum made immediately available. (Tr. 24.)

THE BANK OF NORTH DAKOTA ACT—HOUSE BILL
No. 18. (Tr. 24-30.)

House Bill No. 18, being what is called "The Bank of North Dakota Act", has as its subject the creation of a bank to conduct an ordinary banking business. The title of the Act provides:

"An Act declaring the purpose of the State of North Dakota to engage in the banking business and establish a system of banking under the name of 'The Bank of North Dakota', operated by the state, and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; making an appropriation therefor; and providing penalties for the violation of certain provisions thereof." (Tr. 24.)

§ 2 places the Industrial Commission in full charge of operation, management and control of the bank. (Tr. 25.)

§ 3 gives the Industrial Commission the right to acquire by purchase, lease or the exercise of the right of eminent domain, all property, requisite, etc. (Tr. 25.)

§ 7 requires all public funds to be deposited in the bank, fixing a penalty for any officer or custodian of such funds who violates that provision. (Tr. 26.)

§ 10 provides that all deposits are guaranteed by the State of North Dakota. (Tr. 27.)

§ 15 provides that the Bank of North Dakota may transfer funds to other departments, institutions, utilities, industries, enterprises or business projects of the state, and may make loans to counties, cities or political sub-divisions of the state, or to state or national banks on such terms as the commission may provide, and that it can make loans to individuals, associations, private corporations, when secured by duly recorded first mortgage on real estate in the State of North Dakota, etc. (Tr. 27 & 28.)

Civil Actions may be brought against the State of North Dakota doing business with the Bank of North Dakota for matters arising out of the bank business. (Tr. 30.)

An appropriation of \$100,000.00 out of the general fund of the state is made immediately available to carry out the provisions of this Act was made. (Tr. 30.)

THE BANK OF NORTH DAKOTA BOND ACT—HOUSE
BILL NO. 49. (Tr. 31-35.)

The title to House Bill No. 49 reads as follows:

"An Act providing for the issuing of bonds of the State of North Dakota in the sum of two million dollars, to be known as 'Bonds of North Dakota, Bank Series', prescribing the terms, and stating the purposes thereof; providing a tax and making other provisions for the payment thereof; making appropriations for the payment of said bonds and to carry into effect the provisions of this act; and declaring this act to be an emergency measure." (Tr. 31.)

These are the bonds, the proceeds of which, is to constitute the capital of the Bank of North Dakota. (§ 4, Tr. 32.)

The bank is to be operated for the purpose of making earnings and out of the earnings money shall be paid to the State Treasurer on order of the Commission. (§ 5, Tr. 33.)

Tax levies shall be made sufficient in amount to pay the interest due annually on the bonds. (§ 6, Tr. 33.)

When bonds shall be maturing within a period of five years the Board of Equalization shall levy a tax in an amount equal to one-fifth of the amount of the principal of the bonds. (§ 7, Tr. 33.)

The state treasurer is to establish a bank bond payment fund into which shall be paid moneys de-

lived from taxation from appropriations and from bank earnings. (§ 8, Tr. 34.)

It is also provided that there is appropriated out of the general funds of the state, \$10,000.00 for the purpose of carrying the act into effect, which sum is made immediately available. (Tr. 5.)

BANK OF NORTH DAKOTA REAL ESTATE BOND ACT

—SENATE BILL NO. 130. (Tr. 35-40.)

Title to Senate Bill No. 130 reads as follows:

"An Act providing for the issuing of bonds of the State of North Dakota in a sum not exceeding ten million dollars, to be known as 'Bonds of North Dakota, Real Estate Series', prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal on said bonds, and to carry into effect the provisions of this act; and declaring this act to be an emergency measure." (Tr. 35.)

These bonds are to be issued for the purpose of negotiation and sale to raise money to procure funds for the Bank of North Dakota to replace such funds as may have been employed by the bank from time to time in making loans upon first mortgages upon real estate.

It is provided in § 6 that the face and credit of the State of North Dakota is pledged for the pay-

ment of these bonds, both principal and interest. (Tr. 37.)

It is also provided by § 6 that the moneys derived from the sale of the bonds shall be placed by the Industrial Commission in the funds of the bank, and it is further provided that nothing in this act shall be construed to prevent the purchase of any said bonds with any funds in the Bank of North Dakota. (Tr. 37.)

By § 13 it is provided that the State Board of Equalization shall, if it appears that the funds in the hands of the State Treasurer are insufficient to pay either principal or interest, accruing within a period of one year thereafter, make a necessary tax levy to meet the indicated deficiency. (Tr. 39.)

§ 15 provides that the powers granted by the Act may be repeatedly exercised and the duties falling thereupon shall be likewise repeatedly performed from time to time, thus there is no time limit or period fixed when the state may ever be relieved from the indebtedness thus created. (Tr. 39.)

§ 16 provides for an appropriation of \$10,000.00, making the same immediately available. (Tr. 39.)

The Bank of North Dakota-House Bill No. 18 (Tr. 24), and Bank of North Dakota Bond Act-House Bill No. 49 (Tr. 31), and North Dakota Real Estate Bond Act-Senate Bill No. 130 (Tr. 35) are all connected with the banking business to be carried on by the state.

MILL AND ELEVATOR ASSOCIATION ACT—SENATE

BILL No. 20. (Tr. 40-42.)

The title to Senate Bill No. 20 provides:

"An Act declaring the purpose of the State of North Dakota to engage in the business of manufacturing and marketing of farm products, and for establishing a warehouse, elevator, and flour mill system under the name of 'North Dakota Mill & Elevator Association' operated by the state, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management; and making an appropriation therefor." (Tr. 40.)

§ 1 of the Act declares the purpose of the state to engage in the BUSINESS of manufacturing of farm products and for that purpose shall establish a system

"Of warehouses, elevators, flour mills, factories, plants, machinery and equipment, owned, controlled and operated by it under the name of 'North Dakota Mill & Elevator Association' hereinafter for convenience called 'the Association.'" (Tr. 40.)

By subsequent provisions the Industrial Commission is placed in control of the Association with full power. (See § 2, Tr. 40.)

§ 3 provides that the Commission is authorized to acquire by purchase, lease or right of eminent domain, all necessary property or properties, buildings, etc.; to buy, manufacture, store, mortgage, pledge, sell and exchange all kinds of raw and man-

ufactured farm and food products, and buy products, and to operate exchanges, bureaus, markets and agencies within and without the state, and in foreign countries. (Tr. 40.)

§ 8 contains a provision for the bringing of civil actions against the state of North Dakota on account of causes of actions, arising out of the business. (Tr. 42.)

§ 9 provides for an appropriation of certain money in the treasury that had been theretofore raised by taxation, (Tr. 42) which amounted to over \$100,000.00, and provided that that fund, together with the funds procured through the sale of state bonds, should be designated as the capital of the Association. (Tr. 42.)

NORTH DAKOTA MILL & ELEVATOR ASSOCIATION
BOND ACT—SENATE BILL 75. (Tr. 43-48.)

The title to Senate Bill No. 75 provides:

"An act providing for the issuing of bonds of the State of North Dakota in a sum not exceeding five million dollars, to be known as 'Bonds of North Dakota Mill & Elevator Series'; prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal of said bonds and to carry into effect the provisions of this act; and declaring this act to be an emergency measure." (Tr. 43.)

These are the bonds that are to be issued and sold for the purpose of carrying on the business of the Mill & Elevator Association.

§ 1 authorizes the issuance of State Bonds to be described as set forth in the title. (Tr. 43.)

§ 2 authorizes the Industrial Commission in its discretion to have mortgages executed upon property acquired, etc. (Tr. 43.)

§ 7 provides that the face and credit of the State of North Dakota is pledged for the payment of the bonds, both principal and interest. (Tr. 45.)

§ 7 also provides that these bonds may be purchased with any funds in the Bank of North Dakota. (Tr. 45.)

§ 10 provides for the levy of taxes, sufficient to pay the bonds, principal and interest, taking into account the earnings of the Association. (Tr. 46.)

§ 15 provides for the repetition of the powers therein granted. (Tr. 48.)

§ 17 provides for the appropriation of \$10,000.00, out of the general funds of the state, to carry the provisions of the Act into effect and makes the same immediately available. (Tr. 48.)

HOME BUILDING ACT—SENATE BILL NO. 19.
(Tr. 48-52.)

The title to Senate Bill No. 19 provides as follows:

"An Act declaring the purpose of the State of North Dakota to engage in the enterprise of providing homes for residents of this state and to that end to establish a business system operated by the state under the name of 'The Home Building Association of North Dakota'; and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; and making an appropriation therefor."

§ 2 puts the Industrial Commission in full control of the Home Builders' Association. (Tr. 48.)

§ 3 provides that the Industrial Commission may acquire by purchase, lease or exercise of eminent domain, all requisite property and property rights necessary, etc. (Tr. 49.)

§ 6 provides for the formation of home-builders' liens and fixes the price of town homes at \$5,000.00 and farm homes at \$10,000.00. (Tr. 50.)

§ 7 permits the Industrial Commission to acquire tracts of land by purchase or by exercise of the right of eminent domain, for the purpose of carrying on the business of the Home Builders' Association. (Tr. 50.)

§ 18 provides an appropriation of \$100,000.00 and makes the same immediately available. (Tr. 52.)

(Note) : House Bill No. 19 did not carry a provision for a bond issue, but under its Chapter 24, Senate Bill No. 44 of the 1919 Special Session, a bond issue of two million dollars, known as "Bonds of North Dakota Home Building Series", was provided for.

In connection with the Acts just referred to we would call attention to the fact that in no one of the business enterprises provided for is there any intimation that the service is provided for the purpose of furnishing to the people of the state any article or service which concerns the welfare and convenience of all the inhabitants of the state, or is a business or service that cannot be successfully dealt with without the aid of power derived from the legislature.

There is nothing in any of the Acts to show that there is any need or necessity for the state entering upon any of the business enterprises mentioned, and there is nothing from which it can be said that the entering upon these enterprises will benefit the whole people in equal measure.

On the contrary in each of the Acts the language conveys the idea that the state is about to enter upon some business venture. There was apparently no purpose on the part of those who framed the laws to do aught than to enter upon the conduct of private business in the name of the state.

No legitimate argument can be made that any-

one of the business activities provided by the legislation under consideration is for the purpose of relieving any presently existing condition. The laws complained of provide for the carrying out of some plan of social economics, or of economics socialized.

As was said by the Supreme Court of Wisconsin in *State v. Donald*, 160 Wis. 21, 151 N. W. 331, (365, 369) :

"A state wide tax * * * would need to be for a public purpose in the sense of a matter of common or general interest to those upon whom the burden is laid. There must be some present benefit. * * * 'The actual and supposed beneficial influence' upon individual and community life which might be derived from vitiating the conceptions of sociological thinkers and would-be experimentalists is no excuse for an assault upon, or overturning at any point the fundamental law."

Again in the above case the court laid down the rule that even though done in the form of due process of law, yet an appropriation of private property for a non-public use, even though in the particular case the public might be interested in the enterprise promoted, and be largely, incidentally, benefited, yet the act would be confiscation.

Accepting the rule that the power to tax carries with it the power to destroy, yet it must be conceded that that power to destroy is for governmental purposes only. That rule does not go to the extent that the government, by its power of taxation may ruthlessly and without some public or governmental purpose, destroy the property of the

people, even by taxation. It does not go to the extent that it permits a government with power to destroy by taxation, to confiscate by the same power. There is nowhere lodged the power of confiscation except under certain extreme conditions where the property is required by the government for the purpose of defense.

DECISION OF TRIAL COURT AND OF THE STATE COURT

At this point there are two pertinent inquiries, that might well be propounded, and which call for our attention.

First. Why did the trial court sustain the motion to dismiss the bill of complaint?

In answering the first inquiry, we unhesitatingly announce that the trial judge misconceived the theory of the case, and wholly disregarded the settled rules of practice in matters brought on by demurrer or motion to dismiss.

In the bill of complaint (par. 8, Tr. 4) it is alleged:

"That the plaintiffs bring this action as taxpayers on behalf of themselves and on behalf of the other taxpayers of the state who are many thousand in number, etc."

Notwithstanding this, the trial judge, in the opinion handed down (Tr. 73) says:

"They (the plaintiffs) assert that the suit is brought on behalf of the state to protect it against the unconstitutional use of its funds and an unconstitutional issue of bonds, etc."

This particular matter is dealt with elsewhere in this brief, but we simply mention it here as showing how the trial judge misconceived the case from the beginning.

Three fundamental errors lie at the basis of the Court's decision in sustaining the motion to dismiss upon the merits.

First: The Court ignored the rule which prevails in courts of equity, in disposing of motions to dismiss because the bill does not set up facts to constitute a cause of action, which is to overrule the motion, and let the case go to hearing unless it is founded upon an absolutely clear proposition, that, taking the allegations to be true, the bill must be dismissed at the hearing.

Barry v. Edmunds, 116 U. S. 550; 29 L. Ed. 729.

Wetmore v. Rymer, 169 U. S. 115 (128).

Krouse v. Brevard Tannin Co., 249 Fed. 538 (548).

Second. The court ignored the allegations of the bill of complaint against which the motions of the attorney general and of special counsel were directed, which under settled rules of practice were admitted as upon demurrer.

Third. The court based its conclusion upon matters outside the record.

Plaintiffs in their bill allege (Tr. p. 12): "that no condition exists in the State of North Dakota

which will authorize or justify the state in the exercise of its legitimate functions of government in engaging in the various lines of private "business" in question, and allege that "the facilities now provided for supplying the people of the State of North Dakota with the necessities and luxuries of life and conveniences and requirements for their comfort, welfare and health are adequate"; and they allege in issuable form, what the conditions in North Dakota are.

The facts thus alleged stand admitted by the two original motions, and they are expressly admitted by the answer filed by the Attorney General. (Tr. page 65, par. 26.)

No reference whatever is made by the court to these allegations of the bill or the conditions which exist in North Dakota as they are thus alleged. On the contrary, the Court based its decision wholly on matters outside of the record extrinsic to the bill and contradictory to its allegations. The amended motion (Tr. page 69) states that

"The said motion is made upon the bill of complaint and all the files and proceedings herein, and upon all matters of which said court will take notice, including, among others, certain matters of fact, to-wit".

Attention is then called to various constitutional amendments, concurrent resolutions and political platforms and issues. No pleading or allegations on behalf of the defendants were before the court to which these requests to take judicial notice could apply. The only purpose of the "Amended

Motion" was to present a defense in this action through matters outside of the record which contradict the allegations of the bill and thus furnish a basis for a decision upon the merits. This was the effect given the amended motion by the trial court, and upon which he based his decision. After referring to the scope of the police power as defined by this court, the trial judge said (Tr. page 80, folio 111) :

"In the light of these established doctrines let us look at some of the general facts that condition this case."

He then states with some detail, hypothetical conditions which are claimed to exist in North Dakota (Tr. pages 80, 81 and 82), after which he states (Tr. page 82) :

"The foregoing is what a majority of the people of the state have been persuaded to believe by those whose leadership they trust. Whether their grievances are real or fancied, whether their remedies are wise or foolish, are subjects about which the court is not concerned. The only object in trying to set them forth has been to place the constitutional amendments and laws here assailed in their true relationship to the life and thought of the people by whom they were adopted.

The sole question then for the court is: Do these acts of the state constitute a violation of the Fourteenth Amendment of the Federal Constitution as that amendment has been construed by the Supreme Court? I think it is clear that they do not. Even if I were in doubt, it would be my duty to sustain the action of the state, for it is only when legislation is plainly and palpably unconstitutional that a court is justified in nullifying it.

The motion of the defendants will, therefore, be granted and a decree entered dismissing the bill with costs."

It thus clearly appears that the trial judge based his decision in this case upon his belief that a majority of the people of North Dakota believed that the grievances which he had recited at length in his opinion were real grievances, and that they also believed in the remedies proposed in the legislative acts in question. He did not, however, decide whether the alleged grievances were in fact real, for on this point he said:

"Whether their grievances are real or fancied, whether their remedies are wise or foolish, are subjects about which the court is not concerned."

From the standpoint of settled practice, it is not material whether he based his decision upon what a majority of the people believed as to their alleged grievances, or upon what he himself believed as to their actual existence, for in either case his decision was based upon facts extrinsic to the bill of complaint.

A general demurrer to a bill of complaint is a denial in form and substance, of the right of complainant to have his case considered in a court of equity. It is also an admission that all of the allegations of the bill which are properly pleaded are true; and in ruling upon the demurrer, the court cannot go outside of the allegations of the bill and by resorting to judicial notice, find grounds upon which to sustain the demurrer as against the

positive averments of the bill. See *Griffing v. Gibb*, 2 Black, 519; *Pac. R. R. Co. v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 518; also *Stewart v. Masterson*, 131 U. S., 151, in which the court held that a demurrer to a bill in equity cannot introduce, as its support, any facts which do not appear on the face of the bill, and which under the former practice, must be set up by plea or answer.

Equity Rule No. 29, makes no change in this respect. On this point, the rule reads: "Every defence in point of law *arising upon the face of the bill* * * * shall be made by motion to dismiss or in the answer."

In *Kansas v. Colorado*, 185 U. S. 125 (145), 46 Law Ed. 838 (846) this Court said:

"The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by demurrer."

In *O'Shaughnessy v. Humes, et al.*, 129 Fed. 953, an attempt was made to go outside of a general demurrer in order to sustain it. The court classified the demurrer in this respect as a "speaking demurrer" in that it attempted to establish facts extrinsic to the bill. The court held that "a speaking demurrer" or one setting up facts extrinsic to the bill, will always be overruled", for it is defect of form without considering the merits of defense which can only be made by a plea or answer. A speaking demurrer, or one making defense by setting up facts extrinsic to the bill, will always be

overruled because of that infirmity in the demurrer. See cases cited.

See also:

Old Dominion Trust Co. v. First Nat. Bank,
252 Fed. 613, 618;

Alexander v. Fidelity Trust Co., 214 Fed. 495;

Edwards v. Bodkin, 249 Fed. 562;

United States v. Forbes, 259 Fed. 585, 593;

Carl v. Standard C. & C. Co., 202 Fed. 351;

Richardson v. Lorie, 94 Fed. 375, 379;

Stromberg v. Holly Bros., 260 Fed. 222.

We will also state that the majority opinion of the North Dakota Supreme Court filed January 2nd, 1920, in Green et al, v. Frazier, et al, 176 N. W. 11, which sustains the validity of the laws in question in this case closely followed the procedure of the trial judge in this case. That case is prosecuted in the name of four taxpayers. With some exceptions their complaint is a copy of the bill of complaint in the present action. In that case a general demurrer was interposed to the complaint. Following the practice in this case, the majority of the State Supreme Court ignored the allegations of the complaint, and based their conclusion sustaining the validity of the laws in question on matters outside of the record. Their chief reliance was upon the matters recited by the trial judge in this case. (Tr. pages 80, 82.) These are repeated in the majority opinion of the State Supreme Court. (See page 18.) To these imported

and extrinsic matters the majority of the court added other matters wholly foreign to the complaint, and upon these extrinsic matters rested their decision.

If we may assume that the case of *Green, et al, v. Frazier, et al*, is a bona fide case, and that it is really prosecuted on behalf of the taxpayers of North Dakota, and that it is not a "friendly" or "fictitious" suit, not presenting an actual controversy, as stated by Chief Justice Christianson in his dissenting opinion (see page 25), we have this remarkable situation: The taxpayers of North Dakota as a result of the practice followed in these two cases have had the merits of their claims as to the invalidity of the laws in question summarily disposed of by both the federal court and the state supreme court of North Dakota by their decisions as upon demurrer, which wholly disregarded the allegations of their pleadings, but rested wholly upon issuable matters outside of the record, which were supported by neither allegations or proof. This amounts not only to a denial of justice to the taxpayers of North Dakota, but we believe that it also amounts to a denial of due process in the conduct of the litigation, to which every citizen is entitled.

The trial judge also erred in stating, (Tr. page 80) that the doctrine of *Lowell v. Boston*, 111 Mass. 454, and similar cases have been swept away by "the real supreme tribunal of Massachusetts, the people of that commonwealth", by adopting a

constitutional amendment in 1917, and that in doing this the people of that state had said to the Supreme Court of that state: "You have been wrong all this half century."

It is true that a sweeping amendment was presented to the convention, (Vol. 1 Debates of Constitutional Convention, page 632), but it was not approved and submitted to the electors. The amendment which was approved, submitted and adopted was known as the 47th Amendment, and reads as follows:

"The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency, or distress, of a sufficient supply of food and other common necessities of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine."

It is apparent that the justices of the Supreme Judicial Court of Massachusetts consider the rule announced in *Lowell v. Boston*, *supra*, still in force in that state. We quote from their opinion in *Re Opinion of Justices*, April 2nd, 1919, 122 N. E. 63 (766):

"It is an underlying principle of our government that money raised by taxation can be used only for public purposes and not for the advantage of private individuals.

"The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is

intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object.' " *Lowell v. Boston*, 111 Mass. 454, 460, 461 (15 Am. Rep. 39).

Second: Why did the state Supreme Court in *Green, et al, v. Frazier, et al*, 176 N. W. 11, an action supposed to be similar to the one under consideration, uphold the legislation, and what weight shall that decision be given by this Court?

We will first call the attention of this court to the history of that case, first stating that our knowledge as to the case and its history rests entirely upon the files of the Supreme Court of the state and the opinion published in 176 N. W., page 11, under date March 6th, 1920.

That action was commenced in the District Court in the County of Cass in the State of North Dakota on the 15th day of November, 1919, by E. A. Green and three other taxpayers, as plaintiffs, against the same defendants named in the present suit. The complaint was substantially in the language of the bill in the instant case, except, that part of paragraph 22 of the bill of complaint in the case at bar was omitted from the complaint in the State Court, which fact will be further adverted to.

Such proceedings were had after the commencement of the action on November 15th, 1919, that

return was made by the defendants, a change of venue taken from the District Court in and for Cass county to the District Court in and for Burleigh county, and on November 25th, 1919, the order to show cause why an injunction should not issue was argued before the trial judge at Bismarck.

An order was made sustaining the demurrers to the complaint on the day of argument, and thereafter an appeal was taken to the Supreme Court of the State and appellant's brief filed in the office of the Clerk of the Supreme Court on December 17th, 1919. Respondent's brief filed December 24th, 1919. The decision of the Supreme Court handed down January 2nd, 1920.

It is not necessary for us to express our opinion, or to go outside the record to characterize the case in the State Court. The transactions and the time of their taking place as enumerated above, is some indication, but in addition to that, we have the statement of the Chief Justice of the Supreme Court of North Dakota, in which he says:

"In my opinion this is a so-called friendly or 'fictitious' lawsuit, and does not in fact present an actual controversy. Hence I am agreed that the action should be dismissed. See Chicago, etc., R. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176."

It is apparent from the omission, from the complaint in the State Court, of the allegations contained in paragraph 22 of the bill of complaint in the case at bar, that it was not desired on the part

of those representing the plaintiff in the State Court that there should be presented to that court the facts, circumstances and conditions prevailing in the State of North Dakota.

While there was no allegation in the complaint in the State Court setting forth the actual facts existing with respect to area, population, cities, villages, railway stations, and loading platforms, railways, banks, mills, elevators and general conditions as set forth in par. 22 of our bill, there was a general allegation that the enterprises contemplated did not rest upon public health or welfare of the state or other governmental reasons, but were for the financial benefit and gain of those interested, etc.

In considering the question the State Supreme Court announced a rule by which to distinguish between private and public business.

It defines private business as

"A business or enterprise in which an INDIVIDUAL OR INDIVIDUALS, AN ASSOCIATION, CO-PARTNERSHIP, OR PRIVATE CORPORATION, has invested capital, time, attention, labor, and intelligence for the purpose of creating and conducting such business, for the sole purpose that those who make such contributions may from the conducting of such business make, gain, and acquire a financial profit for their exclusive benefit, improvement, and enjoyment and exclusively for their own private purposes. They are not concerned with the public health, safety, morals, or welfare, but are concerned wholly with making a financial profit from the operation of such business for exclusively their own private use and benefit."

It will be noted from the definition as quoted above, that it was evidently in the mind of the court that a private business contemplated private ownership, and the only deduction to be drawn from the definition of private business would be that if a business were carried on by the state then it would be a public business in the judgment of the Supreme Court of North Dakota.

This distinction is made more manifest in a following paragraph wherein the court furnishes a test, by which to distinguish between private and public business, and says:

"If the industries to be established and which are established are owned and operated by the State in order to promote the general welfare of all the people, and the net profits derived from the operation of such industries become public funds of the State of North Dakota, and payable as such into its treasury for the use and benefit of the State and inhabitants and residents thereof, in like manner as other public funds, THEN IT MUST FOLLOW that the purpose, business, and industries are public."

The theory of the law as announced by the North Dakota Supreme Court is plain. It is in substance and effect, if not in positive terms, simply this: the fact that the profits arising from any business carried on by the state and owned by the state are payable into the State Treasury, there to be used for the benefit of the inhabitants generally, as the general fund in like manner as other public funds, makes of that business, regardless of its characteristics, one that is for a public purpose or a public

use, and is a business for the establishment and maintenance of which money may be raised by taxation.

No other court, so far as we have been able to discover, has ever announced a doctrine so broad as that stated by the Supreme Court of North Dakota, and not only has no other court announced so broad a rule, but the rule thus enunciated by the Supreme Court of North Dakota is contrary to the letter and spirit of the rule to distinguish between public and private purposes as announced by this court and by every state court that has yet had the question before it.

We submit, therefore, that the Supreme Court of North Dakota, at the outset of the consideration of the case then before it, upon the question as to the use of the funds to be raised, either by taxation or that had already been raised, misconceived the rule by which to determine public uses and purposes from those that are private, and hence based its decision upon a misprision.

In further emphasis of the idea pervading the mind of the court, it is said :

"It must be kept in mind also that the 'Bank of North Dakota', the 'Mill & Elevator Association,' and all other agencies established by the state for the purpose of operating the state industries in question are not PRIVATE CORPORATIONS OR PRIVATE AGENCIES, but are, so to speak, ARMS OF THE SOVEREIGN POWER, THE STATE, reaching out to execute its mandates. When the 'Bank of North Dakota' functions, it does so as an agency of the sovereign power of the State, in like manner as the treasurer

of the State of North Dakota. The same is true of every other state industry which is the subject of this controversy."

We repeat that the Supreme Court of North Dakota, in considering the question of public or private purpose and use, did so on the theory that any business enterprise owned and conducted by the state, the profits of which, if any, were to enter the state treasury as general funds of the state, was established and conducted for a public purpose and a public use, because of the expectation that the prospective increase in state revenues would result in benefit to the people of the state generally and promote the general welfare of the state.

We submit also that the theory so patently held by the Supreme Court of North Dakota is in direct conflict with the theory announced by the Supreme Court of Maine in *Loughlin v. Portland*, supra, from which this court, in *Jones v. Portland*, quoted with approval. It is there announced, in unequivocal manner that before an activity is for a public purpose or public use, the subject matter or commodity must be one of public necessity, convenience or welfare, and that in determining the question there must also be taken into consideration the difficulty which individuals have in providing it for themselves. That the purpose of the enterprise must be, not for the sake of indirect gain that may result to purchasers through reduction in price, or incidental benefit to the people of the state, but must be to supply the citizens

with something which is necessary in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty.

After thus explaining the reason actuating the court in holding that the activities provided for by the legislation involved were all public, the majority opinion then turns its attention to what it defines as—

“The reason of the State for entering into the conduct of the industries in controversy.”

The court then quotes at length from the opinion of the trial judge in the instant case, reciting those matters that have been already referred to in dealing with the decision of the trial court, each and all of which were wholly without the record, in fact contrary to the positive allegations of the bill of complaint, and brought into the case in utter disregard of settled rules of practice in equity proceedings.

In the case in the state court there was nothing in the pleadings other than in the pleadings in the Federal Court to support the extraneous matters thus brought in; in fact, not so much, because in the state court there had not been served and filed the speaking demurrer encountered in the Federal Court.

After quoting from the opinion of the trial judge in the case at bar, as above indicated, the state supreme court then says:

“In addition to the clear and concise reasons given by Judge Amidon, there are many others

why the state should engage in the conduct of these industries."

The court then proceeds to relate certain matters, prominent among which it is stated that 90% of the wealth of the State is produced from agriculture.

That the average annual yield of wheat of the state is 125,000,000 bushels.

That there is a spread between No. 1 hard wheat and the lowest grade, of perhaps 20¢, which difference is made to exist on many pretexts.

That the lower grade wheat produces flour of as good grade and quality as the higher grade wheat.

That the only difference between the two grades in certain cases, is a matter of color.

That the loss to the farmers of the state on account of loss in grades and values fixed thereby, amounts to \$55,000,000.00 per annum.

That from thirty to forty per cent of the farmers of the state are tenants.

Each and every matter thus set forth is without foundation in the record, and brought into the case by the mere declaration of the writer of the opinion.

We do not intend to go outside the record, even in an effort to follow the Supreme Court of North Dakota, but we feel that we are justified in saying that the matters thus set forth in the opinion of the trial judge, as well as the matters above enumerated and set forth in the opinion of the supreme court of North Dakota are matters which

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should be set out by way of defense and with respect to some of which there is a substantial and honest dispute and with respect to others of which there can be no question because the public record, both of the state and government, are attainable and disprove, absolutely, the statements made in the opinion.

With respect to the banking business the supreme court of North Dakota bases its upholding of that enactment, apparently, upon the same principle, viz: that it is a business that will earn profits that will be turned into the state treasury and thus promote the welfare of the state, and in support of that proposition the court tells us that

"Though the Bank of North Dakota has been in operation less than a period of six months, it has in that short period of time so firmly established itself and so rapidly did its business materialize that it has been enabled to earn net approximately \$67,000.00; it has made or has in course of completion over \$1,500,000.00 in real estate loans, etc."

We submit that a bank that has been in operation less than six months, and has in that length of time loaned \$1,500,000.00 and has accumulated an earning fund of more than \$67,000,000, is a profit maker that might cause some envy among other financial institutions, but we contend that there is absolutely nothing either in the act itself or in the language of the Supreme Court from which it can be said that the Bank of North Dakota tends to advance the general welfare of the state in any manner. The only possible chance for

it to be of any benefit to the state or the people of the state is that the profits from the bank are placed in the treasury of the state, there to mingle with the state funds and possibly reduce the tax rate for future years. The act provides nothing further; the Supreme Court in its upholding opinion expresses no hope for anything further.

In dealing with the Home Building Act and the provision for the loaning of \$10,000,000.00 upon the farms and real estate within the state for the purpose of securing and providing homes for residents of the state, the Supreme Court of North Dakota makes no attempt to justify the act upon any theory of public purpose announced by any other court. It justifies the act on the principle that the improved financial welfare of a considerable number of people is of such benefit to the state that taxes may be raised and the money expended for the purpose of carrying on the enterprise that will result, or is expected to result in such improved financial condition.

The court speaks of the home as the unit of organized and civilized society; as a miniature government wherein legislative, executive and judicial power is exercised; speaks of the fond recollections with which many consider the home of their youth; speaks of the fact that from 30 to 40 per cent of the farmers of the state are tenants; expresses the idea that if these people had homes which by the exercise of "reasonable effort" and the doing of a "reasonable amount of labor" could

be retained by them, that they would become attached to these homes and would become vitally interested in all that concerned the homes, and thus become vitally interested in the welfare of the state and the nation, and then said that in the opinion of the court the legislature was moved by a spirit to bring about such a condition of home owning and that hence the Home Building Act, which provides for the taking of property by taxation and by eminent domain from A for the purpose of turning it over to B is a constitutional enactment, even under the provisions of the 14th Amendment.

We present this brief analysis of the opinion of the Supreme Court of North Dakota, not in any sense as a criticism of the intent or purpose of the court, but in an effort to show to this court that the Supreme Court of North Dakota entirely misconceived the rule of law by which to determine whether a given purpose was public or private, and labored under a mistaken idea as to what constituted general welfare and as to where the line of demarcation lay as between incidental and direct benefits to the public.

We also suggest that the Supreme Court of North Dakota was mistaken in another matter.

It is apparent from the opinion of the court that in rendering the opinion in the Green case, *supra*, the court believed that it was laying down a rule to be accepted by this court, for in the opinion it is said:

"In deciding, as we have supra, that the state ownership and construction of elevators and mills, the creating of the Bank of North Dakota, and the authorizing and issuing of all the bonds in question are for a public use, for which the legislature may authorize the levying and collecting of a tax on the property within this state, it is clear by the highest authority that the decision of this court will be accepted and accorded the highest respect, if properly based upon merits and the provisions of the state constitution under consideration, and the laws in question are not contrary to the provisions of the federal constitution, and we hold they are not; for this court is presumed to be in better position to know the conditions existing in the State affecting the matters in controversy, and is more favorably situated to acquire accurate information in that regard."

There is no question but that the Supreme Court of a state is in better position to know of those facts that are properly brought before it, than a court far removed from the state, but that rule does not contemplate that a state court may go outside of the record and bring in extrinsic and issuable matters upon which to base an opinion. Having so brought into the case extrinsic and issuable matters as the basis for its opinion, we submit that the decision of the Supreme Court of the State of North Dakota is entitled to no weight in determining whether the taxes required to carry out the provisions of these different legislative enactments are for a public purpose.

BANK AND MILL & ELEVATOR ACTS.

The banking business and the mill and elevator business as authorized and provided for in the laws under consideration, each, is in all of its essential characteristics, a purely commercial, competitive business. There is nothing in either the business of banking or milling that makes it one in which all of the public have a right to share. Even conceding that the banking business might be so carried on that a lower rate of interest could be given to those who have the security necessary to borrow from the bank, or conceding that the operation of the mill and elevator association might result in changing in some respects the grade of certain grains, or in keeping within the state some by-products that are not now so kept, yet neither business is such a one that it concerns the welfare and convenience of all of the inhabitants of the state. Neither business is such that it cannot be successfully dealt with and its benefits brought to the people without the aid of the powers derived from the legislature. (Laughlin v. Portland, 111 Maine, 486; 90 Atl. 318.) There is nothing in either business that will enable the citizen to be supplied with something which is necessary in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty, and at times perhaps not at all, and whose absence would endanger the community as a whole. (Jones v. Portland, 245 U. S. 217.)

There is absolutely nothing about the carrying on of either the banking or the mill and elevator business from which it can be said that the state is attempting to provide any necessity of life at cost to the inhabitants of the state.

It is true, as was said by Mr. Justice Peckham, in *Clark v. Nash*, 198 U. S. 361, (369); 49 L. Ed. 1085, that a public use may frequently and largely depend upon the facts surrounding the subject, but there is nothing in this case to indicate in any manner that any service to be rendered by either the bank or mill and elevator is a service tending to the welfare of all the inhabitants or one that cannot be successfully dealt with without the aid of the legislative power. There are no benefits conferred by either of these businesses that cannot be secured through private channels, but on the contrary, the allegations of our bill show that all of these things are supplied.

The Court in *Clark v. Nash*, *supra*, page 369, said:

"But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary

to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

HOME BUILDING ACT.

When we consider the Home Building Act we are dealing with a class of business that has less of public purpose involved than either the bank or mill and elevator business.

The Justices of the Supreme Judicial Court of Massachusetts, In re Opinion of the Justices, 211 Mass. 625; 98 N. E. 611, (612, 614), having before them the question of the constitutionality of an act authorizing the state to purchase land, build upon and rent, manage and sell the same, stated the law applicable to such proposed enactment in very apt and forcible language. They said:

"The substance of it (the law) is that the Commonwealth is to go into the business of furnishing homes for people who have money enough to pay rent and ultimately to become purchasers. It is not a plan for pauper relief."

Then taking up the question of public use, the Court said:

"To this fundamental test must be brought all governmental activity in every system based upon reason, rather than force. The dominating design of a statute requiring the use of public funds must be the promotion of public interest and not the furtherance of the advantage of individuals. However beneficial in a general or popular sense it may be that private interest should prosper and thus in-

identally serve the public, the expenditure of public money to this end is not justified."

Speaking further of the subject there involved, the Justices quoted with approval from *Lowell v. Boston*, 11 Mass. 454, as follows:

"The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object."

Proceeding, the Justices said:

"Buying and selling land always has been freely exercised by all individuals who desired, under the Constitution. Proprietorship of his own home has been one of the chief elements of strength in the citizen, and widely diffused land ownership has conferred stability upon the state. It is a matter of common knowledge that thousands of inhabitants of the commonwealth who are "mechanics, laborers or other wage-earners" have become, through industry, temperance and frugality, owners of the homes in which they dwell. These proprietors, however humble may be their houses, cannot be taxed for the purpose of enabling the state to aid others in acquiring a home whose temperament, environment or habits have heretofore prevented them from attaining a like position. Although eminent domain differs from taxation in the occasion and manner of its exercise, it rests for its justification upon the same basic principle of public necessity. If this be held to be a public purpose, it would be lawful to authorize the commission to exercise the power of eminent domain. This would mean that the home of one wage-earner might be taken by the power of the commonwealth for the purpose of handing it over to

another wage-earner. Neither the power of taxation nor of eminent domain goes to this extent."

In the acts under consideration in the instant case the right of eminent domain, as well as the right of taxation, is granted, and it is possible in either instance, and particularly in the Home Building Act, to do just exactly that thing that the Justices of the Supreme Court of Massachusetts held could not be done.

There exists no power to enforce such an enactment, for as said by Mr. Justice Miller, in *City Savings & Loan Assn. v. Topeka*, supra :

"No court would hesitate to adjudge void any statute declaring that the homestead now owned by "A" should no longer be his, but should henceforth be the property of 'B.' " (See also *Chicago B. & Q. v. Chicago*, 166 U. S., 226, (237) ; 41 L. Ed. 979 (1885).

It is recognized as a fundamental principle that a state is simply a political unit and not a business corporation, except incidentally to further its political purposes. In its organization and machinery it is not adapted to acquire, own, manage, or make a profit out of lands or other property, except for public use.

In *re Opinion of Justices (Maine)*, 106 Atl. 865 (1871).

And in determining what is a public use the question is not whether the thing can be done economically, but whether the doing of it falls within the legitimate functions of government.

FACTS AS SHOWN BY THE BILL.

Thus far we have discussed the question of public purpose from the standpoint of the provisions of the legislative acts themselves and without reference to the state conditions as alleged in our bill and admitted by the motions.

We desire at this time to take up that particular phase of the question.

In paragraph 22 of our bill, the plaintiffs, for the purpose of showing that the expenditure of public funds and the creation of the public debts complained of, are not based upon the public health or welfare of the people of the state or any other governmental reason that would justify the proposed expenditure or creation of debts, set forth facts to show that no condition existed in the state of North Dakota which would authorize or justify the state in the exercise of its legitimate functions of government, in engaging in the various lines of private business contemplated.

It is set forth that North Dakota has an area of 79,837 square miles and a population, according to the war census of 664,625; it has 53 counties, each of which is served by one or more of six railroads whose total mileage, including main line and branch line trackage is 6295 miles.

On the lines of its several railroads are more than 250 incorporated cities and villages and numerous unincorporated hamlets, and altogether

1,000 railroad stations or sidings, where freight and merchandise is loaded and unloaded, with numerous privately owned general stores where merchandise and food products, including flour and all of the necessities of life, are kept for sale and sold.

It has 74 flour mills in operation, which are scattered over the various parts of the state, with a capacity varying from 25 to 1800 barrels per day, and a total capacity of 16,720 barrels a day, or 5,000,000 barrels capacity for a year. The mills thus privately owned and operated have a capacity of producing between 7 and 8 times more flour than the people of North Dakota consume and after feeding all of the people of the state, there must be exported from the state over 4,000,000 barrels of flour per year.

These facts are uncontroverted. They are admitted by the motion to dismiss. They stand today before the court admitted as the facts because they cannot be denied. We ask in all earnestness how, with a mill capacity feeding all the people of the state, with 74 flour mills scattered throughout 53 counties, with an export flour product of more than 4,000,000 barrels per year, can it be said, that the establishment of a mill is supplying any need of the government or is furnishing any facility for its citizens, which is not amply provided for in the regular and ordinary course of private business.

There is nothing about the "Mill and Elevator Association Act" that even remotely suggests the

grist mill of the early days with the obligation resting upon the proprietor to grind for and serve all without discrimination, and a community entirely dependent upon that local service to turn its crop into food.

On the contrary, the facts disclosed by the record as above referred to, show a state thoroughly well supplied with mills manufacturing more flour than the people of the state can use, in fact, making of us an export state to the extent of more than 4,000,000 barrels per annum.

Then again the Act provides for a system of warehouses, elevators, flour mills, factories, plants, machinery and equipment to carry on the business of manufacturing farm products, with full power to deal in these commodities even as a private person and to establish exchanges, bureaus, markets and agencies anywhere in the world. (Tr. 40-41.)

Between the old grist mill and the business provided for under the "Mill and Elevator Association Act" there is nothing in common, except that wheat was to be ground in the first and may be in the second.

The first was a community service. The second is a great system of commerce and trade, which may become world-wide and involve any and all kinds of mills, factories, plants and warehouses to deal in and carry on the manufacture of any and all farm products and by-products.

For instance :

Terminal Grain Elevators,

Warehouses and Local Elevators.

Flour Mills,

Flax Mills,

Tow Mills, Linseed Oil Mills, Oatmeal Mills,

Packing Plants, Canneries—and such other businesses as may be desired may be established anywhere in the United States. In addition to which there may be established anywhere in the world, Exchanges, Bureaus and Agencies for the purpose of furthering and carrying on the business authorized.

Can there be any question as to the character of the business authorized? We contend not, and submit that the purpose is essentially private.

With respect to the elevators it is shown in the bill that there are more than 2,000 licensed and privately owned warehouses and elevators located at railroad stations in the several counties of the state with a total capacity for storing grain of more than 60,000,000 bushels. The opinion of the Supreme Court of this state gives the maximum yield of 125,000,000 bushels, so if that be true, we have in the state a storage capacity for approximately one-half of the maximum yield, of the state, and three-fourths of the average yield.

All people understand the movement of grain. It is not stored either in North Dakota or in Minnesota or any other western state. It is continually being moved forward and these elevators with

this great capacity have been able and will be able to handle all the grain of the state.

There are in the state 706 state and national banks, with capital and surplus ranging from \$10,000.00 to \$560,000.00; there are a large number of loan and trust companies and numerous loan agencies specializing in making loans on farm lands, and individual loan agencies are distributed throughout the state and in each and every county thereof, in addition to which it has a great number of building and loan associations specializing in making loans upon city property.

In addition to the numerous banks and loan agencies we have operating in this state the Federal Land Bank, loaning upon farm property.

North Dakota has an area of 40,000,000 acres; more than one-half is unbroken prairie used for grazing and stock raising, and a large proportion of the tax payers of the state, who are the owners of a large part of the taxable property of the state, are in no manner interested in any of the business enterprises or projects authorized by this legislation.

These facts were not presented to the State Court, but are all before this Court. Therefore, in passing upon these questions and in determining whether or not these proposed enterprises are for a public purpose, this court has before it certain

facts, circumstances and conditions that were not presented to the state court.

The facts thus presented to this court and which were not presented to the state court are important, and we submit that the decision of the state court given without a consideration of the state conditions, as set forth in our bill, cannot be of any benefit to this court in the case at bar and is entitled to no weight.

On June 6th, 1919, seven justices of the Supreme Judicial Court of Maine, some of whom were the same justices who joined in the opinion in the case of *Laughlin v. Portland*, *supra*, delivered an answer to certain questions submitted by the Legislature, and their opinion is reported as *In re Opinion of the Justices* in 106 Atl. 865.

Speaking of a constitutional provision of Maine granting to the legislature full power to make and establish all reasonable laws, etc., the Court said:

"The established construction of this provision as to the scope of legislative powers governing taxation is that the purpose for which the taxes are raised must be one which is admitted in law to be just and reasonable, and proper for government to carry out. It must be in the exercise of a governmental function. The state cannot enter upon a commercial enterprise, however alluring the prospect, and tax the people for its promotion."

After enunciating the principle above the court proceeds:

"The decisions in *Laughlin v. City of Portland*, 111 Me. 486; 90 Atl. 318, and *Jones v. Portland*, 113 Me. 124; 93 Atl. 41, subsequently affirmed by the Supreme Court of the United States (245 U. S. 217; 62 L. Ed. 252), in no way conflict with this principle. In those cases a Municipal Fuel Yard Act (R. S. c. 4, § 64) was held to be within the power of the Legislature on the ground that it enables our citizens to be supplied with fuel, which is a necessity in its absolute sense to the enjoyment of life and health, and which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose want would endanger the community as a whole. The elements of commercial enterprise or pecuniary benefits to the municipality either direct or indirect were entirely lacking. In fact, they were expressly prohibited by the statute under consideration which compelled the furnishing of fuel by municipalities at cost. That decision was in line with the general rule laid down by Judge Cooley in his work on *Constitutional Limitations* when he declares that 'if the object is to furnish facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which on account of their peculiar character, and the difficulty, and perhaps impossibility, of making provisions for them otherwise, it is alike proper, useful, and needful for the government to provide', then taxes may be levied to provide these facilities."

The justices in their opinion, page 872, reiterate rule that we have contended for in this argument, viz:

"Public benefit or interest are not synonymous with public use. * * * Neither mere

public convenience nor mere public welfare will justify the exercise of the right of eminent domain.

* * * If the doctrine of public utility were adopted to its fullest extent, there would practically be no limit upon the exercise of this power. Property is devoted to public use when and only when the use is one which the public in its organized capacity, to-wit, the state, has the right to create and maintain, and therefore one in which all the public has a right to demand and share in. * * * It must be more than a mere theoretical right to use. It must be an actual, effectual right to use."

It is frequently urged by those who are advocating enlarged powers of government, that times have changed, and that governmental functions are not today what they were a few years ago. That the principles governing the rights of governments in dealing with the citizen have been enlarged in their scope.

We cannot agree with the suggestion. We believe that principles are the same today that they were when written into the constitution. We recognize, however, that changing conditions and the legitimate growth of the common law brings about the application of established principles of law to a new set of facts.

Thus it is that the courts have approved of laws extending the power of taxation and of eminent domain to cases involving:

Light, Heat, Water, Drainage, Irrigation, Sewerage, Cemeteries, Parks and Recreational places, each and every activity furnishing something to

the people that promoted general welfare and, for some reason could be much better furnished by the government than by private enterprises. Through all the cases there runs the suggestion that there is a line beyond which the state cannot go, which line while sometimes dim and uncertain, is clear and certain when run along the field of trade and commerce and especially so when such trade or commerce is carried on for profit.

A determined effort is being made in North Dakota, not to reconcile a new set of facts with established legal or governmental principles, but to so enlarge the power of the state, that the inherent rights of the citizens shall be destroyed, and the authority of unlimited and uncontrolled majority rule established.

Such action is violative of the Fourteenth Amendment to the Constitution of the United States.

We contend, therefore, that:

The Judgment of the Trial Court Should be Reversed.

Respectfully submitted,

N. C. YOUNG,

Fargo, N. D.,

TRACY R. BANGS,

C. J. MURPHY,

Grank Forks, N. D.,

Attorneys for Appellants.

APR 7 1920
JAMES D. NAHER;
CLERK.

In The
Supreme Court Of The United States

OCTOBER TERM, 1919.

No. 508.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVER-
SON, ET AL,

Appellants,

VS.

LYNN J. FRAZIER, ET AL,

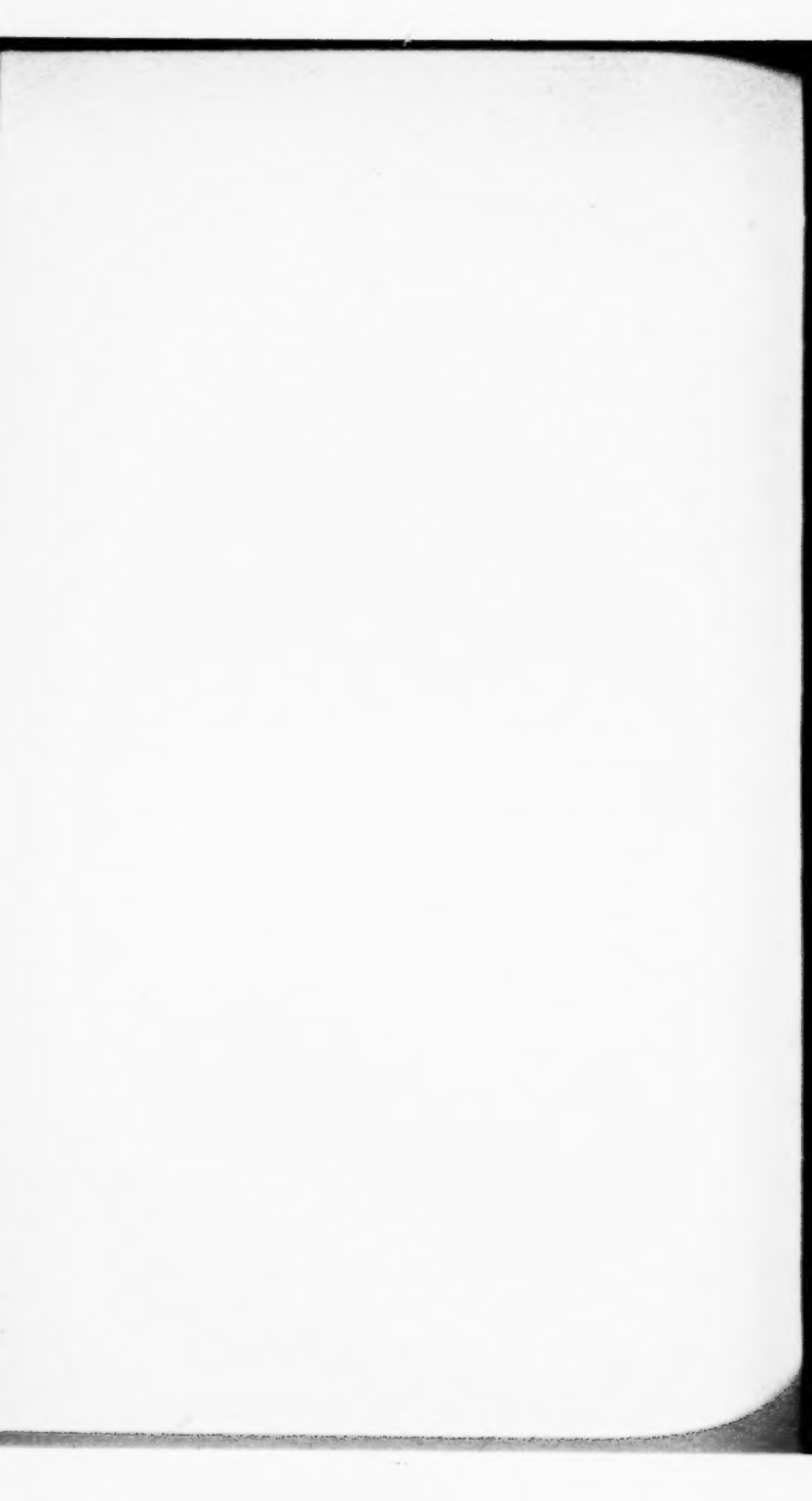
Appellees.

APPELLEE'S BRIEF

WILLIAM LANGER,
Bismarck, North Dakota,
Attorney General of the State of
North Dakota,

W. S. LAUDER,
Wahpeton, North Dakota,

S. L. NICHOLS,
Mandan, North Dakota,
Attorneys for Appellees.



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In The
Supreme Court Of The United States

OCTOBER TERM, 1919.

No. 508.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, L. A. WOOD, NELS NICHOLS, GEORGE SIDNER, EMIL SCOW, W. C. MARTIN, HENRY MCLEAN, GEORGE P. HOMNES, B. W. HERSEY, T. W. BAKER, GEORGE CHRISTENSON, R. H. LEVITT, E. J. MEGEATH, E. A. ANDERSON, S. B. OAKLEY, O. F. BRYANT, GEORGE D. ELLIOTT, JOHN SATTERLUND, P. S. CHAFFEE, ALFRED THURING, J. S. GARNETT, J. E. BAKER, JOHN R. EARLY, H. C. JOHNSON, JOHN C. LEACH, FRED STECKNER, FRED L. ROQUETTE, IVER K. BAKKEN, MICHAEL TOAY, J. L. HARVEY, WILLIAM BURNETT, NATHAN UPHAM, ORLANDO BROWN, J. O. HANCHETT, W. W. WILDE, ARLO ANDREWS, DUNCAN BROWNLEE, W. W. COFELL, E. B. ROSCOE, C. H. KINNEY, on behalf of themselves, and all other taxpayers of the State of North Dakota,

Appellants,

vs.

LYNN J. FRAZIER, WILLIAM LANGER and JOHN N. HAGAN, acting and pretending to act as the Industrial Commission of North Dakota; LYNN J. FRAZIER, CARL KOZITSKY, WILLIAM LANGER,

OBERT OLSON, and THOMAS HALL, acting as the State Auditing Board; LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, and MINNIE J. NIELSON, constituting and acting as the Board of University and School Lands; OBERT OLSON, as State Treasurer of the State of North Dakota; CARL KOZITSKY, as State Auditor of the State of North Dakota, and LYNN J. FRAZIER, as Governor of said State, WILLIAM LANGER, as Attorney General of said State, JOHN N. HAGAN, as Commissioner of Agriculture and Labor of said State, THOMAS HALL, as Secretary of State of said State, and MINNIE J. NIELSON, as Superintendent of Public Instruction of said State, and LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, OBERT OLSON, JOHN N. HAGAN and MINNIE J. NIELSON, individually,

Appellees.

APPELLEES' BRIEF

STATEMENT OF THE CASE.

This is an ordinary taxpayers' suit. The action was brought in the United States District Court for the District of North Dakota. The appellants are forty-two in number and in their bill of complaint they allege that they are residents and taxpayers of the State of North Dakota. The purpose of the suit is to enjoin the appellees from paying out certain funds belonging to the State and raised by taxation, and from issuing and selling state bonds and using the proceeds thereof for the purpose of carrying out the industrial pro-

gram contemplated by certain Acts of the Legislature of the state, and certain provisions of the Constitution of the state. The Acts involved were adopted by the Sixteenth Legislative Assembly and were and are known as House Bills 17, 18 and 49 and Senate Bills 130, 20, 75 and 19, which Acts purport to authorize such expenditure and the issuance of the bonds in question. These several Acts are set out in full in the record. (Tr. p. 21 fo. 28 et seq.)

The appellees are state officers. Their official character is correctly set forth in appellants' brief. (P. 3.)

Governor Frazier and Commissioner Hagen were and are represented by special counsel. The remaining appellees were and are represented by the Attorney General and his assistants. (Tr. ps. 52, 53, 66, 67, 68, 72.)

The bill of complaint is set forth in full in the record. (Tr. p. 1, fo. 2 to p. 20 fo. 27). The answer is set forth in full in the record commencing Tr. p. 53 fo. 74 and ending p. 66 fo. 88. The extracts from the bill contained in appellants' brief are, so far as they go, correct.

On the 7th day of April, 1919, a motion to dismiss the suit was duly filed by the Attorney General. (Tr. p. 52 fo. 73½). On April 15, 1919, the Attorney General filed an answer on behalf of the appellees. (Tr. p. 53 fo. 74 et seq.). On April 25, 1919, the Attorney General filed a further motion to dismiss. (Tr. p. 67 fo. 90 et seq.). This motion was based upon the following grounds:

"Motion to Dismiss."

Filed April 25, 1919.

(Title of Case.)

Comes now the defendants and move the court to dismiss the bill of complaint of plaintiffs herein upon the points of law presented by the answer herein, upon the following grounds:

"First. The court is without jurisdiction to hear and determine this action because:

(a) The bill of complaint shows on its face that it is in effect an action against the sovereign State of North Dakota and fails to show that the State of North Dakota has consented to be sued in this action.

(b) The bill of complaint fails to show that the matter in controversy, or cause of action, alleged therein arises under the laws or the Constitution of the United States.

(c) The bill of complaint fails to show that the interest of any one of the plaintiffs "in the matter in controversy exceeds in value the sum of three thousand dollars (\$3,000.00)" and shows that the plaintiffs form a class of parties who have relation to the common fund sought to be administered.

Second. That there is a non-joinder of parties defendant to this action, for the reason that the bill of complaint on its face shows that the State of North Dakota is the real party defendant, and the State of North Dakota is not made a party defendant to the action and said State cannot be made a party defendant.

Third. That the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

WILLIAM LANGER,
Attorney General of the State of
North Dakota."

The motion to dismiss was heard upon the bill of complaint, answer and written motion. The learned trial court, on June 14, 1919, filed an opinion together with an order dismissing the bill, (Tr. p. 72 fo. 97 et seq.) and on the same day a decree dismissing the bill was duly entered. (Tr. p. 83 fo. 116 et seq). From that decree this appeal was taken by appellants.

Reduced to simplest form the motion to dismiss the ~~appeal~~^{case} was granted on the grounds:

"1. That the bill on its face shows that it is, in effect, a suit against the sovereign State of North Dakota and fails to show that the State of North Dakota has consented to be sued;

2. That the bill of complaint fails to show that the matter in controversy, the cause of action, alleged therein arises under the laws or the Constitution of the United States;

3. That the bill of complaint fails to show that the interest of any one of the plaintiffs "in the matter in controversy" exceeds in value the sum or amount of three thousand dollars;

4. That there is a non-joinder of parties defendant for the reason that the bill on its face shows that the State of North Dakota is the real party defendant and the State of North Dakota is not made a party defendant to the suit and said state cannot be made a party defendant;

5. That the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity."

ARGUMENT

JURISDICTION

The complainants in this suit invoke the jurisdiction of the District Court of the United States for the District of North Dakota under the first paragraph of section 24 of the Judicial Code, 36 Stat. at L. 1091, upon the grounds:

(a) "That the suit arises under the "due process" and "equal protection" clauses of the fourteenth amendment to the Constitution of the United States, and under Section 4 Article IV of the same Constitution, which section guarantees a republican form of government to each of the several states;

(b) That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000.00) Dollars."

JURISDICTIONAL ELEMENTS MUST BE ALLEGED

The bill of complaint must show upon its face the elements requisite to confer jurisdiction upon the Court, and therefore must allege facts which show that the suit arises under some provision of the Constitution or laws of the United States, and that "the matter in controversy exceeds in value the sum of Three Thousand (\$3,000.00) Dollars."

Re. Win, 213 U. S. 458;

Chappell vs. Waterworth 155 U. S. 102;

Tenn. vs. Union Bank 152 U. S. 454.

MEASURE OF AMOUNT IN CONTROVERSY

If the "amount in controversy" in this suit is the amount of the public funds appropriated by the legislature of North Dakota for carrying into effect the legislative enactments set out in the bill of complaint, and the amount of the bonds the issuance of which is authorized by such legislative

enactments, then the "amount in controversy" is several million dollars, and the trial Court had jurisdiction of the suit. On the other hand if the "amount in controversy" is the injury or damage that will result to either of the complainants by reason of taxes which he would be compelled to pay on account of the acts sought to be restrained, then the bill of complaint fails to show upon its face that the "amount in controversy" exceeds Three Thousand (\$3,000.00) Dollars, and fails to allege a requisite jurisdictional element.

Defendants contend that in this suit which is to restrain an alleged illegal expenditure of public funds by public officials, and an alleged illegal issue of bonds by the State of North Dakota, which it is alleged will increase the taxes of the complainants, the "amount in controversy" is the injury or damage that will result to the complainants by the increase of their taxes, and not the amount of the public funds the expenditure of which is threatened, and the amount of the threatened issue of bonds, nor the total amount of the taxes threatened to be levied.

Colvin vs Jacksonville 158 U. S. 456;

Green vs Jacksonville & Interurban Railroad Company 244 U. S. 499;

Cowell vs City Water Supply Company 121 Fed. 53;

Reslev vs Utica 168 Fed. 737;

Wheeler vs City of St. Louis 180 U. S. 399;

Rogers vs Hennepin County 239 U. S. 621.

Colvin vs Jacksonville, supra, was an action to restrain a threatened issue of bonds for One Million (\$1,000,000.00) Dollars. It was shown that the taxes of the complainant would not be increas-

ed in the sum of Two Thousand (\$2,000.00) Dollars, the amount then necessary to confer jurisdiction on the Federal Court, if such bonds were issued. The trial Court held that it was necessary for the complainant to show that his taxes would be increased in the sum of at least Two Thousand (\$2,000.00) Dollars in order for the Federal Court to acquire jurisdiction to try the action, and because the taxes of complainant would not be increased in such sum, dismissed the action for lack of jurisdiction. The trial Court certified to the Supreme Court the question as to whether the amount of the threatened issue of bonds, or the amount by which the taxes of the complainant would be increased if such bonds were issued, was *the amount in controversy* in the suit on the question of the jurisdiction of the trial Court. In deciding this question the Supreme Court at page 460 said:

“This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect of that, we have no doubt the ruling of the Circuit Court was correct.”

The question as to jurisdiction presented in the case at bar is precisely the same question that was presented in *Colvin vs Jacksonville*, supra, viz., is the “amount in controversy” the injury or damage which will result to the complainants, or the total amount of the public funds the expenditure of which is sought to be restrained, and the total amount of bonds the issuance of which is sought to be enjoined?

The bill of complaint in the case at bar does

not allege the assessed valuation of the taxable property in the State of North Dakota owned by the complainants, or by any one of them, and does not allege in what proportion taxes in the State of North Dakota generally will be increased, or in what amount the taxes of complainants, or any one of them, will be increased by the expenditure of the public funds or the issuance of the bonds alleged in the bill of complaint, and therefore fails to allege any facts from which the alleged amount of the injury or damage which will result to complainants, or any one of them, can be determined by the Court.

The right of any taxpayer in the State of North Dakota to maintain an action in the proper Court to restrain the issuance of the bonds mentioned in the bill of complaint, if such bonds are illegal, and if his taxes would thereby be increased, is conceded, for his property would be taken without "due process of law" to the extent which his taxes would be illegally increased. But the Court in which a taxpayer may litigate the question of the validity of such laws, and the legality of such bonds depends upon the amount of the monetary interest of such taxpayer in the bonds to be issued. Manifestly the monetary interest of such taxpayer is only the amount of taxes which he would be compelled to pay by reason of the legislation assailed. If such taxes amount to less than Three Thousand (\$3,000.00) Dollars, then he must bring his suit in the State Court, notwithstanding that it may ultimately reach the Supreme Court of the United States for final decision as to the validity of the legislation; but if such taxes

amount to more than Three Thousand (\$3,000.00) Dollars, then he may elect to bring his suit in the the District Court of the United States. That the suit arises under the Constitution or laws of the United States is not alone sufficient to confer jurisdiction on the District Court of the United States; but the monetary interest of the complainant in the matter in controversy must exceed Three Thousand (\$3,000.00) Dollars, and the bill of complaint must so show.

Section 24 Jud. Code, 36 Stat. at L. 1091.

There is language in some of the cases which seems to support the proposition that in a suit by taxpayers to restrain an alleged unlawful expenditure of public funds, or illegal issuance of bonds, "the amount in controversy" as respects the jurisdiction of a Federal Court is the amount of such fund, or such bonds.

Brown vs Trousdale, 138 U. S. 389;

Crampton vs Zabriski, 101 U. S. 601;

Ottumwa vs City Water Supply Company,
119 Fed. 315;

Davenport vs Buffington, 97 Fed. 234.

Brown vs Trousdale, *supra*, greatly relied upon by appellants, is a case in which a large number of taxpayers of Muhlenburgh County, Kentucky, brought action *in the State Court* against the officers of the County, certain resident bond holders, and all other holders of bonds issued by the County to a railroad company in an amount of Four Hundred Thousand (\$400,000.00) Dollars, or more, to have all the bonds declared illegal, to enjoin the collection of the bonds, and to enjoin the collection of taxes for the payment of interest thereon. Trousdale, owning such bonds to the

amount of Seven Thousand (\$7,000.00) Dollars, and another person, both of whom were residents of the State of Tennessee, applied to the Court and were made parties Defendant to the action, *and thereupon procured an order of the State Court removing the case to the Federal Circuit Court, where a motion to remand the case to the State Court was denied.* On the pleadings, and agreed statement of facts and proof, the Circuit Court dismissed the bill. On appeal to the Supreme Court, it was decided *that the case was improperly removed to the Federal Court, the decree of the Circuit Court was reversed with directions to remand the case to the State Court.* This case was considered by the Court in Colvin vs Jacksonville, supra, and the statement made that Brown vs Trousdale, is not contrary to the decision in the former case. So the statement in Brown vs Trousdale to the effect that the matter in controversy is the amount of the bonds, is modified by Colvin vs Jacksonville, and Brown vs Trousdale is not an authority on that proposition.

In Crampton vs Zabriski, supra, the Board of Chosen Freemen of Hudson County, New Jersey, purchased from Crampton certain real property, conveyance of which to the County was executed by him, and issued to him in payment therefor bonds of the County in excess of Two Hundred Thousand (\$200,000.00) Dollars. These bonds were issued in violation of a State law prohibiting the expenditure by a County in any year of a greater sum than the taxes levied for that year. The Supreme Court of the State by writ of certiorari reviewed the actions of the Board issuing

the bonds, and by its decision declared the proceedings for the issuance of bonds illegal and the bonds void. At the maturity of the bonds Crampton, who was not a resident of the State of New Jersey, brought an action at law in the Federal Court to collect the bonds, the complaint in which action showed the requisite jurisdictional amount. Zabriski and other resident taxpayers of the County then brought an action in equity in the Federal Court to enjoin further proceedings in the action at law by Crampton to have the bonds declared void and to compel a surrender thereof by Crampton, and a reconveyance of the property to him. The Federal Court had undoubted jurisdiction of the action at law by Crampton, and as the action in equity by Zabriski was ancillary to and a part of the action at law, the Court acquired jurisdiction in the equitable action by reason of its jurisdiction in the action at law. Therefore, the statement of the Court that,

“Resident taxpayers have a right to invoke the interposition of a Court of equity to prevent an illegal disposition of the moneys of the County.”

Was not made with reference to the jurisdictional amount, and is only a statement that such taxpayers have such right when the action is brought in the proper Court, which right is conceded by Defendants. Crampton vs Zabriski was decided prior to the decision in Colvin vs Jacksonville, supra, and any language in the former case which is not in harmony with the decision in the latter case, must be deemed to be modified or qualified by the latter decision.

In *Ottumwa vs City Water Supply Company*, supra, the City of Ottumwa, Iowa, was about to issue municipal bonds in excess of Three Hundred Thousand (\$300,000.00) Dollars, in violation of a constitutional provision of the State of Iowa, for the construction of municipal water works. The City Water Supply Company, a taxpayer of said City, brought an action in the Federal Court to enjoin the issuance of the bonds, and alleged in its bill of complaint that its taxes would be increased in excess of Three Thousand (\$3,000.00) Dollars by the issuance of the bonds. The Court says in paragraph I, page 318:

"The amount in dispute in this suit, if only measured by the injury to the complainant from the increased taxation of its property in the City of Ottumwa necessary to provide for the payment of the bonds proposed to be issued for the construction of the new water works was more than sufficient to sustain the jurisdiction of the Circuit Court."

The Court further said in paragraph II that

"The matter in dispute was whether the City had power and authority to issue bonds in a sum in excess of Three Hundred Thousand (\$300,000.00) Dollars."

Since the interest of complainant was sufficient to confer jurisdiction, the latter statement is obiter and is clearly in conflict with the decision in *Polvin vs Jacksonville*, supra, and should not be considered as an authority.

In *Davenport vs Buffington*, the action was by taxpayers to restrain the officials of the City of Downingville, Indian Territory, from dividing up and selling as town lots a park in said City which had been dedicated to the public. When this case

was commenced, the tribal courts of the Cherokee nation had exclusive jurisdiction of all cases arising in the Cherokee country in which members of that tribe were the only parties, while the United States Courts in the Indian Territory had jurisdiction of every civil case arising between a citizen of the United States and any citizen or person residing in the Indian Territory. All parties to the action except one Tarrant were members of the Cherokee nation. Tarrant was a citizen of the United States and a resident taxpayer in the City of Downingville. The question of jurisdiction was whether the action should have been brought in the tribal courts of the Cherokee nation. The Court held that because Tarrant was a citizen of the United States the action was properly brought in the United States Court of the Indian Territory. No question of an amount necessary to confer jurisdiction on the trial Court was involved in the case. The action was brought in the proper court without regard to the value of the interest of the complainant, and therefore the statement of the Court to the effect that a taxpayer has the right to restrain an illegal disposition of the property of a City, was only a statement of the general principle that a taxpayer has such right when his action is brought in the proper Court, and is not a statement that a taxpayer can bring such action in the Federal Court without a showing that his damage is in excess of Three Thousand (\$3,000.00) Dollars.

Colvin vs Jacksonville has never been qualified by any decision of the Supreme Court; and an examination of subsequent decisions will show

that complainants in actions brought by taxpayers to restrain alleged illegal taxation, have been careful to allege that the taxes of such complainant by reason of the acts sought to be restrained would exceed Three Thousand (\$3,000.00) Dollars.

**INTERESTS OF COMPLAINTS CANNOT BE AGGREGATED
TO MAKE UP JURISDICTIONAL AMOUNT**

The bill of complaint fails to allege facts showing that the combined taxes of all the Plaintiffs would be increased in a sum in excess of Three Thousand (\$3,000.00) Dollars by the legislation assailed; but even if the bill of complaint should so show, the Defendants contend that the value of the interests of the several Plaintiffs cannot be aggregated to produce the amount required to give the Court jurisdiction.

Clay vs Field, 138 U. S. 464;

Walter vs N. E. Ry. 147 U. S. 370;

Wheless vs St. Louis, 180 U. S. 379;

Hope vs Bergemen, 60 Fed. 1;

Jones vs Mutual Fidelity Company, 123 Fed. 506;

Ex. parte Baltimore & O. R. Co. 106 U. S. 5;

Rogers vs Hennepin County, 239 U. S. 621.

In *Wheless vs St. Louis*, supra, several owners of separate lots abutting on a City street, brought an action in the Federal Court to enjoin the City from making improvements on such street by special assessment against the property abutting thereon. It was shown that the assessment against no one complainant would be in excess of Three Thousand (\$3,000.00) Dollars. The bill was dismissed, and the Court said:

“Distinct and separate interests of complainants in a suit for relief against assess-

ments, whether they are made or merely threatened, cannot be united for the purpose of making up the amount necessary to give the Court jurisdiction."

In *Rogers vs Hennepin County*, supra, claimants representing themselves and others numbering altogether more than five hundred-fifty, brought an action against Hennepin County and certain of its officers to restrain taxation against complainants by reason of their membership in a certain organization. It was shown that the taxes against no one complainant would exceed Forty (\$40.00) Dollars, and the Court dismissed the action because the interest of no one claimant was sufficient to give the Court jurisdiction, and the interests of the complainants could not be aggregated for that purpose.

In *Clay vs Field*, supra, the Court said:

"The general principle is that if several persons be joined in a suit in equity or admiralty and have a common and undivided interest, although separable as among themselves, the amount of the joint claim or liability will be the test of the jurisdiction; but where their interests are distinct and they are joined for the sake of convenience only and because they form a class of parties whose rights or liabilities arose out of the same transaction, or for relief under a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving the Court jurisdiction, but each must stand or fall by itself alone."

Discussing this question (Tr. p. 73 fo. 99 et seq.) the learned trial court said:

"2. Plaintiffs assert that in suits to restrain an unconstitutional use of public funds

or issue of bonds, or levy of tax, the amount of the funds or of the bonds or of the tax is the measure of the 'amount' in controversy and not the injury to plaintiffs. There is some language in the cases which supports that view. It is, however, at variance with the decision of the Supreme Court in *Colvin vs Jacksonville* 158 U. S. 456, and with the uniform practice in Federal Courts since that decision has become known to the profession. That was a taxpayers' suit. It was brought to restrain a threatened issue of bonds for one million dollars. It was proven that the amount of taxes which would be levied on plaintiff's property in case the bonds were issued would be less than \$2,000, the amount then necessary to confer jurisdiction, and the trial court dismissed the bill for want of jurisdiction. Plaintiff insisted that the amount of the bond issue, and not his tax liability, was 'the amount in controversy,' and at his instance the court certified the question of jurisdiction to the Supreme Court. Anyone who will read the certificate as set forth at page 458 of the report, will see that the exact question involved under this heading of the present case was there presented to the Supreme Court. In deciding it the court says, at page 460: 'This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect of that, we have no doubt the ruling of the Circuit Court was correct.' The court then examines *Brown vs. Trusdale*, 138 U. S. 389, which was cited to me by counsel for the plaintiffs, and then orders decree affirming the decision of the lower court. It is plain, therefore, that the court there regarded *Brown vs. Trusdale* as in harmony with the decision which it was rendering, or that its language ought to be qualified so as to bring it into harmony.

The case of *Colvin vs. Jacksonville*, *supra*, is not referred to by the Circuit Court of Appeals of this circuit in its opinion in *City of Ottumwa vs. City Water Supply Company*, 119 Fed. 315.

Plaintiff's interest in the *Ottumwa* case was sufficient to confer jurisdiction, so the language in the second paragraph of the opinion on page 318 was obiter, and, as it is in direct conflict with the decision in the *Colvin* case, must be treated as an erroneous statement of the law.

Colvin vs. Jacksonville has never been qualified or criticised by the Supreme Court or any circuit court of appeals. From the date of that decision to the present time it has been the uniform practice in taxpayers' suits to restrain an issue of bonds, or a levy of taxes, to show that plaintiffs' threatened damage was sufficient to confer jurisdiction. The latest decision on the subject is *Greene vs. Louisville & Interurban Railroad Co.*, 244 U. S. 499-508. See also *Orleans-Kenner Electric Ry. Co. vs. Dunbar* 218 Fed. 344; *Cowell vs. City Water Supply Co.*, 121 Fed. 53, and *Resley vs. Utica*, 168 Fed. 737.

In suits to enjoin a threatened tax levy, and that is the nature of the suit here, in all its aspects, the authorities are uniform that the individual plaintiffs *must each* have an interest to the amount of \$3,000, and that several plaintiffs cannot aggregate their interests for the purpose of making up the \$3,000. *Wheelees vs. City of St. Louis*, 96 Fed. 865; same case, 180 U. S. 399; *Rogers vs. Hennepin Co.*, 239 U. S. 621.

How then are the numerous cases referred to in *Dillon on Municipal Corporations*, 5th Edition, Section 1579, et seq., and cited to the court in argument, to be explained? That is not difficult. None of them asserts rights under the Fourteenth Amendment. They all involve cases in which cities were attempting

to levy taxes or issue bonds in violation of *state laws or state constitutions*. With the exceptions presently to be mentioned, the cases all arose in state courts. There it is not necessary for a plaintiff to show any particular amount as the basis of jurisdiction. Taxpayers may sue in the state courts, and claim the protection of the Fourteenth Amendment without showing that they have a personal interest amounting to \$3,000. The only object of the averment that they are taxpayers is simply to show that they are not intermeddlers. If the state courts deny to taxpayers thus asserting rights under the Fourteenth Amendment, a writ of error to the Supreme Court of the United States will lie to review the decision. This distinction must be kept constantly in mind in examining decisions of the Supreme Court. Was the case brought before that court by writ of error from the highest court of the state, or by writ of error or appeal to review the decisions of a Federal Circuit, or District Court. In one case the amount involved is immaterial, and in the other it is controlling.

It remains to notice two cases which are relied on by plaintiffs. The first is *Crompton vs. Zabriski*, 101 U. S. 601. That involved an issue of bonds by the county of Hudson in the State of New Jersey for several hundred thousand dollars.

The bonds were illegal because no provision for their payment by tax levy was made as the law required. On certiorari to the board issuing the bonds, a judgment was entered by the Supreme Court of the state, declaring them void. Notwithstanding this judgment, the bonds were issued to the plaintiff, Crompton. He then brought an action at law to collect the bonds in the Federal Court. Jurisdiction of this action was based upon diversity of citizenship and the complaint showed

the requisite jurisdictional averment. Zabriski and two other resident taxpayers of the county thereupon filed a bill of complaint on the equity side of the Federal Court, praying that the bonds be declared void, and be delivered up, and that the board be ordered to reconvey the property to Crompton, and that he be enjoined from prosecuting the action at law or parting with the bonds in any other way than by surrendering them to the board. This bill was, of course, ancillary, and jurisdiction of the Federal Court to entertain it rested upon its jurisdiction over the action brought by Crompton. Such being the nature of the suit, two facts are clear; First, that the taxpayers' rights were based on a violation of state law, and not on the Fourteenth Amendment. Second, That jurisdiction of the court was based on the original action brought by Crompton, and the complaint in that clearly showed a right in the plaintiff sufficient to confer jurisdiction. What the court says in the passage quoted by counsel about the right of taxpayers to maintain a suit in equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt, is addressed to the question whether taxpayers have a right to maintain such suit to protect their own interests, and has nothing to do with the question for which the quotation was cited in the argument here, namely, the right of taxpayers to assert rights of the state, or of a city. Mr. Justice Field in the language used, is answering the contention that a taxpayer under no circumstances can maintain such a suit. Such is the holding of the courts of New York and several other state courts. Dillon on Municipal Corporations, 5th Edition, Section 1585.

The other case cited by plaintiffs here is *Daveport vs. Buffington*, 97 Fed. 234. That came before the Circuit Court of Appeals of this Circuit on appeal from the Supreme

Court of the Indian Territory. It involved therefore no question of jurisdiction of the trial court, as a Federal Court, depending upon a showing that the plaintiff had a right of the value of \$3,000. The suit was brought by taxpayers to prevent the use of property which had been given to the city for a park for other purposes. The taxpayers filed their bill to enforce this trust. No right is asserted under the Fourteenth Amendment. The passage quoted simply goes to the general question of the right of taxpayers to maintain a suit in equity to prevent a misuse of property or funds belonging to a city.

It may be doubted whether taxpayers may maintain a suit against state officers to vindicate alleged rights of a state. I have been unable to find any authority that would support such a doctrine. Such suits have been confined to actions against municipal officers to vindicate the rights of cities. Such are all the cases cited by Judge Dillon in his work on *Municipal Corporations*, Section 1579. The reasons which permit such suits in the case of municipal corporations has no application to states. Municipal corporations exist under special charters and have only such powers of taxation as are specifically conferred upon them. They have many of the qualities of a private corporation and the right to maintain taxpayers' suits has been rested upon the same ground as the right of stockholders to maintain similar suits in behalf of a private corporation. States are not municipal corporations. Their powers are not defined by charter. They possess all powers except as they are limited by the state and federal constitutions. This is especially true of their power to tax. The power to maintain taxpayers' suits even against municipal officers has been denied by the courts of New York, Massachusetts and several other states. Dillon, Sec. 1585, et seq. I can find no justification for ex-

tending the doctrine to actions against state officers.

From this examination, the conclusion necessarily follows that plaintiffs must show a personal interest amounting to \$3,000, in order to give this court jurisdiction, and as no such showing is made in the present bill, the jurisdiction of the court as a federal court fails."

ACTION IN EFFECT AGAINST THE STATE

It is elemental that the State cannot, without its consent, be sued either in its own Courts or Courts of the United States, by citizens of another State or by its own citizens.

Hans vs Louisiana, 134 U. S. 1;

Smith vs Reeves, 178 U. S. 232;

11th Amendment Const. U. S.

Whether or not an action brought against the officers of a State is in effect an action against the State, is often a very perplexing question, and the determination of this question depends upon the facts in each particular action, and must be determined by a consideration of the nature of the case as presented by the whole record. Where the State is not a party to an action and its rights are affected by the judgment, the action is in effect an action against the State, and the Court acquires no jurisdiction.

Foster's Federal Practice, page 390;

Poindexter vs Greenow, 114 U. S. 270;

In re: Ayers, 123 U. S. 443;

Fitz vs McGhee, 172, U. S. 516;

Louisiana vs Jumel, 107 U. S. 711;

Hagood vs Southern, 117 U. S. 52;

Cunningham vs Macon & Brunswick Ry. Co.,
109 U. S. 46;

Elliott vs Wiltz, 107 U. S. 711;

Oregon vs Hitchcock, 202 U. S. 60;

Wells vs Roeper, 246 U. S. 335;
Belknap vs Schild, 161 U. S. 11.

In *Fitz vs McGhee*, 'supra, the Court said:

"To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates. As a State can act only by its officers, an order restraining those officers from taking any steps in execution of a statute, is one which restrains the State itself, and the suit is consequently as much against the State as if the State was named as a party Defendant on the record."

Plaintiffs allege in paragraph 8 of the bill of complaint, pp. 3 and 4 f. 5 of the transcript, that there are public funds in the Treasury of the State of North Dakota, amounting to more than Three Hundred Thousand (\$300,000.00) Dollars, which funds will be expended pursuant to the appropriations made by the legislative enactments set out in the bill; and paragraph 13 of the prayer of the bill of complaint, p. 19 f. 25 of the transcript, asks that the Defendants be restrained from paying out or disbursing the money in the State Treasury, appropriated by such legislation.

Defendants contend that as to the money in the State Treasury when this suit was commenced,

the expenditure of which is sought to be restrained, the State is a necessary party, and the action is in effect an action against the State. The decree, if in favor of the complainants, will limit and control the sovereign political power of the State in the administration of its finances. If there is any trust as to such money, the State is the trustee. The State Treasurer is only custodian of such money as an agent of the State, and his acts with reference thereto are the acts of the State. No Court can acquire jurisdiction in an action directly against the State, without its consent, to regulate or control the disbursement of money in its Treasury, neither can it acquire jurisdiction over the officers in charge of such money so as to control their actions with reference thereto as against the political power of the State.

In *La. vs Jumel*, supra, which was an action by mandamus against the State Treasurer and other State officers to compel the State Treasurer to apply money in the Treasury, derived from taxation for a particular purpose, to the purpose for which the money was raised, and to enjoin him from transferring such money to the general funds of the State, the Court said:

“The Treasurer of the State is not a trustee of moneys in the State Treasury, he holds them only as the agent of the State. If there is any trust, the State is the trustee, and unless it can be sued, the trustee cannot be enjoined. Courts cannot, when the State cannot be sued, set up jurisdiction over the officers in charge of public moneys, so as to control them as against the political power in their administration of the finances of the State.”

In *Belknap vs Schild*, the action was against officers in the military service of the United States by a patentee of a caisson gate, to enjoin the use thereof by such officers who had not procured from the patentee permission to use or manufacture the patented article, and the Court said:

“But no injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its Treasury when the suit is commenced; or where the State has otherwise such an interest in the object of the suit as to be a necessary party.”

In *Cunningham vs Macon & Brunswick Ry. Company*, *supra*, the action was against the Governor and Treasurer of the State in foreclosure proceedings against a railroad in the possession of the State, and to which it had legal title, in dismissing the bill of complaint on demurrer, the Court said:

“The bill is to all intents and purposes a suit against the State. It is her property and not that of the State officers that is to be affected by the decree of the Court. The attack is not made against the State directly but through her officers. This indirect way of making the State a party is just as open to objection as if the State had been named as a Defendant.”

ADOPTION OF STATE CONSTITUTION A POLITICAL

QUESTION

Plaintiffs allege in the bill of complaint that Section 182 of Article XII of the Constitution of North Dakota, with reference to the debt limit of the State, and Section 185 of Article XII of said Constitution, which amendment specifically permits the State to engage in any industry, enter-

prise or business not prohibited by Article XX of the same Constitution, did not receive a majority of all the legal votes cast at the election in 1918, at which said question was voted upon. (See paragraphs XIII and XIV bill of complaint, pp. 6 and 7 f. 8 and 9 transcript). The bill of complaint further alleges that the sixteenth legislative assembly of the State of North Dakota approved the constitutional amendments referred to. (See bill of complaint, paragraph XVI transcript, p. 7 f. 10). Thus the bill of complaint shows on its face that the political power and authority of the State of North Dakota determined that such constitutional amendments were legally and properly adopted.

“The question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution, cannot be settled in a judicial proceeding. The political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State; and the judicial power has followed its decisions; and the Courts of the United States adopt and follow the decisions of the State Courts which concern merely the constitution and laws of the State.”

Luther vs Borden, 7 How. 1, 12 L. ed. 581.

In State ex. rel. Byerley vs Board of Canvasers, 172 N. W. 80 (N. D.), the Supreme Court of the State of North Dakota decided that the amendments to the Constitution of the State of North Dakota hereinbefore mentioned were legally adopted by the voters of the State.

Therefore the question as to whether the constitutional amendments referred to were adopted

is not a judicial question to be determined in this action.

WHETHER A STATE MAINTAINS A REPUBLICAN FORM OF GOVERNMENT IS NOT A JUDICIAL QUESTION.

Plaintiffs allege that the legislation assailed is in violation of the fundamental principles of a republican form of government. (See paragraph 20 bill of complaint, transcript p. 11 f. 14).

Whether any State maintains a republican form of government is purely a political question, not cognizable by the Courts.

Marshall vs Dye, 231 U. S. 250;

Pacific State Telephone & Telegraph Co. vs Oregon, 223 U. S. 118;

Kiernan vs Portland, 223 U. S. 151;

Ohio ex. rel. Davis vs Hildebrant 241 U. S. 565;

Mountain Timber Company vs Washington, 243 U. S. 219.

In Pacific States Telephone & Telegraph Company vs Oregon, supra, the Court said:

"Whether the adoption of amendments to the Constitution of a state so alter the form of government of the State as to make it no longer republican, within the meaning of Section 4 Article IV of the Constitution, is a purely political question, and therefore not cognizable by the judicial power, but one solely to be determined by Congress."

FURTHER UPON THE QUESTION OF JURISDICTION

In support of their contention that the trial court had jurisdiction and committed error in dismissing the suit for want of jurisdiction appellants' counsel cite the recent case of

Green et al vs Frazier et al, 176 N. W. 11, (N. D.)

and in commenting thereon say:

“So thoroughly is the rule established in North Dakota that in the recent ‘friendly case’ *Green, et al. v. Frazier, et al*, 176 N. W. 11, involving the validity of the legislative Acts which are attacked in the present action and brought by only four taxpayers, all from the same County, and in which the defendants are the same State Officials who are named as defendants in the case at bar, and were represented by the same counsel, no question of the right of the four taxpayers to maintain that action on behalf of themselves and other taxpayers of the State was raised.” (Appellants brief p. 31).

Passing for the present counsel’s reference to this case as a “friendly case” we need only remind the court that the case was instituted in the *state court* which unquestionably had jurisdiction regardless of the amount involved and therefore the Supreme Court of North Dakota had no occasion to consider the question of jurisdiction, the question with which we are now dealing.

Many of the cases cited by appellants’ counsel in their voluminous brief were, like *Green vs Frazier, supra*, cases that originated in the state courts or in courts in which no particular amount was necessary to confer jurisdiction. Cases of that kind, of course, have no application to the question of the jurisdiction of the district courts of the United States in taxpayers’ suits brought by residents of the state in which the actions are brought.

As already shown and as admitted by appellants, the appellants are all residents of the state of North Dakota. Jurisdiction, therefore, was not founded upon diverse citizenship. It was con

ceeded that whatever jurisdiction the trial court acquired it acquired under the provisions of Section 24 of the Judicial Code which is as follows:

"Sec. 24. The District Court shall have original jurisdiction as follows: First, Of all suits of a civil nature at common law or in equity.....where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States....."

Inasmuch as the appellants were all residents of the State of North Dakota it goes without saying that the trial court could not found jurisdiction alone upon a violation of any law or constitutional provision of that state. To give court jurisdiction it was necessary that two facts appear upon the face of the bill, namely;

1. That a violation of the Fourteenth Amendment to the Federal Constitution was either threatened or committed, and

2. That the matter in controversy exceeded, exclusive of interest and costs, the sum or value of three thousand dollars.

There are forty-two plaintiffs but whether they are active, bona fide litigants or whether the use of their names as plaintiffs was solicited by others more deeply interested in instituting and carrying on the litigation we shall not stop to discuss; suffice it to say that it does not appear on the face of the complaint that the taxes of either of these forty-two plaintiffs or of all of them combined will be increased to the extent of three thousand dollars by reason of the enforcement of the laws here involved and the carrying out of the industrial program foreshadowed in those laws. Therefore,

so far as the plaintiffs are concerned (and that must be the test), the amount in controversy does not exceed *the sum or value* of three thousand dollars. For the reasons already given and the authorities cited we conclude that the trial court had no jurisdiction of the suit and committed no error in dismissing the suit for want of jurisdiction.

AMENDMENTS TO CONSTITUTION OF NORTH DAKOTA

PROPERLY ADOPTED

Complainants allege in paragraph 15 of the bill of complaint, p. 7 f. 9 of the transcript, that the amendments to Sections 182 and 185 of the Constitution of North Dakota, which amendments are set out in the bill of complaint, did not receive a majority of all the legal votes cast at the general election in November, 1918, at which said proposed amendments were voted upon, and that said amendments were not properly adopted.

Subdivision 2 of Section 202 of the Constitution of North Dakota as amended by Article 16 of amendments thereto is as follows:

“Any amendment or amendments to this Constitution may also be proposed by the people by the filing with the Secretary of State, at least six months previous to a general election, of an initiative petition containing the signatures of at least twenty-five per cent of the legal voters in each of not less than one-half of the counties of the state. When such petition has been properly filed the proposed amendment or amendments shall be published as the legislature may provide, for three months previous to the general election and shall be placed upon the ballot to be voted upon by the people at the next general election. Should any such amendment or amendments proposed by initiative petition and sub

mitted to the people receive a majority of all the legal votes cast at such general election, such amendment or amendments shall be referred to the next legislative assembly, and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each house, such amendment or amendments shall become a part of the Constitution of this state."

Section 182 of the Constitution of North Dakota as originally adopted, and prior to the amendment thereof hereinafter set forth was as follows:

"The state may, to meet casual deficits or failure in the revenue, or in case of extraordinary emergencies, contract debts, but such debts shall never in the aggregate exceed the sum of two hundred thousand dollars, exclusive of what may be the debt of North Dakota at the time of the adoption of this constitution. Every such debt shall be authorized by law for certain purposes to be definitely mentioned therein, and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax discontinued until such debt, both principal and interest, shall have been fully paid. No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for public defense in case of threatened hostilities; but the issuing of new bonds to refund existing indebtedness, shall not be construed to be any part or portion of said two hundred thousand dollars."

Section 185 of the Constitution of North Dakota as amended by Article 18 of Amendments thereto is as follows:

“Neither the state nor any county, city, township, town, school district or any other political sub-division shall loan or give its credit or make donations to or in aid of any individual, association or corporation except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in any work of internal improvement unless authorized by a two-thirds vote of the ple. Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways.”

At the general election held in the State of North Dakota on the 5th day of November, 1918, the question of amending Sections 182 and 185 of the Constitution of North Dakota was submitted to the electors of the State in accordance with the provisions of Section 202 of the Constitution, petitions for such submission having been previously filed with the Secretary of State. The question submitted to the electors with reference to Section 182 of the Constitution was whether said section should be amended to read as follows:

“(Section 182 in Article 12). The state may issue or guarantee the payment of bonds, provided that all bonds in excess of two million dollars shall be secured by first mortgages upon real estate in amounts not to exceed one-half of its value; or upon real or personal property of state owned utilities, enterprises or industries in amounts, not exceeding its value, and provided, further, that

the state shall not issue or guarantee bonds upon property of state owned utilities, enterprises or industries in excess of ten million dollars.

“No further indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax or make other provisions, sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax, or of such other provision, to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purposes of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for the public defense in case of threatened hostilities.”

The question submitted to the voters at said election with reference to Section 185 of the Constitution, was whether said section should be amended to read as follows:

“(Section 185 in Article 12 as amended by Article 18 of amendments). The state, any county or city, may make internal improvements and may engage in any industry, enterprise or business, not prohibited by Article 20 of the Constitution (which later Article prohibits the manufacture or sale of intoxicating liquors); but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation, except for reasonable support of

the poor, nor subscribe to or become the owner of capital stock in any association or corporation.”

The State Board of Canvassers of the State of North Dakota certified that at said election there were cast 46,275 ballots in favor of amending Section 182 of the Constitution as hereinbefore set forth, and 34,235 ballots were cast against such amendment; and said State Board of Canvassers certified that said proposed, initiated amendment was duly carried, adopted, approved and ratified.

Said State Board of Canvassers certified that at said general election 46,830 ballots were cast in favor of amending Section 185 of the Constitution as hereinbefore stated, and that 32,574 ballots were cast against such amendment, and further certified that said proposed initiated amendment was duly carried, adopted, approved and ratified.

See Session Laws of North Dakota, 1919, pp. 507 and 508.

By a concurrent resolution adopted by a vote of the majority of the members of both houses of the legislative assembly of the State of North Dakota, the amendment to Section 182 of the Constitution of North Dakota was duly declared adopted by the electors of said State and a part of the Constitution thereof, which concurrent resolution was approved January 20, 1919.

Session Laws of North Dakota, 1919, Chap. 85.

By a concurrent resolution adopted by a vote of the majority of the members of both houses of the legislative assembly of the State of North Da-

ota, which concurrent resolution was approved January 20, 1919, the legislative assembly of the State of North Dakota declared that the amendment to Section 185 of the Constitution was duly adopted by the electors of the State, and had become a part of the Constitution of the State.

Session Laws of North Dakota, 1919, Chap. 89.

Thus the political power of the State of North Dakota has declared that the amendments to Sections 182 and 185 of the Constitution were properly adopted.

It is the contention of Defendants that the question whether or not an amendment to a constitution of a state has been adopted by a majority of the electors, at an election upon such question, is not a judicial question, and cannot be determined by the Court.

In *Luther vs Borden*, 7 How. 1, the Court said:

“The question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution, cannot be settled in a judicial proceeding; the political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the state; and the judicial power has followed its decisions, and the Courts of the United States adopt and follow the decisions of state courts which concern merely the constitution and laws of the state.”

In *State ex. rel. Byerley vs Board of Canvasers*, 172 N. W. 80 (N. D.), an application by the state, on relation of W. E. Byerley, a taxpayer, was made to the Supreme Court of the State of North Dakota, for a writ of certiorari to the

State Board of Canvassers, for the purpose of reviewing the proceedings and certificate of said Board of Canvassers on the question of the adoption of the amendments hereinbefore mentioned to Sections 182 and 185 of the Constitution of North Dakota. The Court issued an order requiring the State Board of Canvassers to show cause why such writ should not be issued. On the hearing on such order, the Court decided that such amendments were properly adopted by a majority of the legal votes cast at the election at which such amendments were submitted to the electors, and that the certificate of the Board of Canvassers to the effect that such amendments had been properly adopted was correct, and denied the application for the writ of certiorari.

Pursuant to provisions of the Constitution of North Dakota, certain legislative enactments set out in the bill of complaint herein, towit: House Bill No. 17, known as the "Industrial Commission Act," and House Bill No. 18, known as the "Bank of North Dakota Act," were submitted for rejection or approval to the electors of the State of North Dakota at a special election held for that purpose on June 26, 1919, at which election 61,188 votes were cast in favor of said "Industrial Commission Act," and 50,271 votes were cast against said Act; and 61,495 votes were cast in favor of said "Bank of North Dakota Act," and 48,239 votes were cast against such Act, as shown by the certificate of the State Board of Canvassers, Session Laws, North Dakota, 1919, pages 509 and 510.

Thus it is apparent that a substantial majority of the electors of the State of North Dakota have declared in favor of the industrial and economic program provided for by the legislative enactments attacked in this action, both by adopting amendments to the constitution of the state so that such enactments would not contravene any provision of the constitution, and also by approving at an election held for that purpose such of the legislative enactments as were submitted to the electors for their rejection or approval.

Subsequent to the legislative enactments mentioned in the bill of complaint herein, the Governor and State Treasurer of the State of North Dakota executed bonds of the State of North Dakota pursuant to House Bill No. 49, known as the "Bank of North Dakota Bond Act," in the sum of Two Million Dollars (\$2,000,000.00), and requested the Secretary of State of said State to certify on each of said bonds that the same was issued pursuant to law and was within the debt limit of the state, which certificate is required by Section 1 of the Act mentioned. The Secretary of State refused to make such certificate, claiming that pursuant to Section 182 of the Constitution of the state as amended, the State could legally issue such bonds only to the amount of Two Million Dollars (\$2,000,000.00) including any bonds of the state outstanding at the time. Action in mandamus was brought by the State on the relation of the Attorney General against the Secretary of State to compel him to place such certificate upon each of said bonds. The Court decided that Sec-

tion 182 of the Constitution as amended authorized the issuance of bonds by the State, unsecured, except by the faith and credit of the State, to an amount of Two Million Dollars (\$2,000,000.00), exclusive of any bonds of the State then outstanding, and by a peremptory writ of mandamus, required the Secretary of State to certify that each of said bonds was issued pursuant to law and was within the debt limit of the State.

State ex. rel. Langer, Atty. Gen. vs Hall, Secy of State.

IS THE PURPOSE FOR WHICH THE FUNDS IN QUESTION ARE BEING RAISED A PUBLIC PURPOSE?

Is the legislation involved in this litigation unconstitutional under the Fourteenth Amendment? Is the use for which the funds are to be raised under the legislation in question a *public use* or a *mere private use*?

No unvarying test has yet been established or even formulated by which it may be determined definitely and accurately whether a given use is a *public use* or a *mere private use*. The general rule gathered from all the decisions is that each case must be determined upon its own particular facts. It is also well established that a law providing for raising money by taxation will not be held to be unconstitutional unless it is palpably so.

It is, of course, elementary law that an Act of the law making power will not be held unconstitutional unless it is clearly and palpably so. All presumptions will be indulged in favor of the constitutionality of the given Act. In determining whether a legislative Act is or is not constitutional under the Fourteenth Amendment the

court will take a broad view of the situation presented, the evils against which the legislation is aimed, the surrounding circumstances as presently existing and the probable future requirements of the people affected. Upon this point the Supreme Court of Maine in

Laughlin vs Portland, III Me. 486—90 Atl. 318, said:

"The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago may, because of changed conditions, have ceased to be such today. . . . On the other hand, what would not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now."

In the same case the court further said:

"In the case of Fuel a practical difficulty is caused by the existence of monopolistic combinations. The mining, transportation and distribution of coal has, in the process of industrial development, fallen into the hands of these combinations to such an extent that the greater part of the supply is in the absolute control of the fuel companies, etc."

This language is peculiarly applicable to the case at bar when we consider the agencies and combinations that, for years have had, practical-absolute control of the transportation, grading

selling and distribution of the farm products of North Dakota.

If the people of Maine, for the purpose of relieving themselves from the oppression of monopolistic combinations in the matter of coal, can lawfully establish and conduct coal yards with funds raised by taxation on what principle may not the farmers of North Dakota relieve themselves from the oppression of similar combinations in the matter of farm products in the same way?

The people of North Dakota, we submit, have the same right to be relieved from the intolerable monopolistic conditions that for many years have obtained with respect to the transportation, sale, grading and distribution of their products as the people of the city of Portland had to be relieved from the same conditions with respect to fuel. While the nature of the business is not the same the controlling principle is the same. In the case last cited the court further said:

"The determination by the legislature that the use for which property is authorized to be taken is a public one, is, undoubtedly, subject to review by the court. But all reasonable presumptions are in favor of the validity of such determinations by the legislature and **the act must be regarded as valid unless it can be clearly shown to be in conflict with the constitution.**"

In discussing this precise question this court in *Jones vs Portland*, 245, U. S. 217, said:

"The act in question has the sanction of the legislative branch of the state government, the body primarily invested with the power to determine what laws are required in the pub-

lic interest. That the purpose is a public one has been determined upon full consideration by the Supreme Court of the state, upon the authority of the previous decision of that court.....The attitude of this court toward state legislation purporting to be passed in the public interest and use declared to be by the decision of the court of last resort of the state passing the act has often been declared. While the elementary authority to determine the validity of legislation under the fourteenth amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular city is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view a judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect."

The Supreme Court of the State of North Dakota sustained the legislation in question on the distinct ground that the use for which the funds in question were to be raised was a public use. *Green vs Frazier*, 176 N. D. 11.

Appellants' counsel, in the course of their argument, have indulged in repeated criticisms of this decision. These criticisms we will answer later in this brief.

"A decision of the highest court of a state declaring a use to be public in its nature will be accepted unless clearly not well founded." *Union Lime Co. vs Chicago etc. Ry. Co.*, 223 U. S. 211.

To the same effect see also

Falbrook Irrigation vs. Bradley, 164 U. S. 112.

Clark vs Nash, 198 U. S. 361-369.

Strickley vs Hyland Boy Min. Co., 200 U. S. 527.

Offield vs N. Y. etc. Ry. Co., 203 U. S. 372-377.

Hairston vs Danville Etc. Ry. Co., 208 U. S. 598-607.

In deciding the case of Jones vs Portland, supra, this court said:

“The decision of the case turns upon the answer to the question whether the taxation is for a *public purpose*. It is well settled that moneys for other than *public purposes* cannot be raised by taxation, and that the exertion of the taxing power for merely *private purposes* is beyond the authority of the state.”

And in support of what was said this court cited Citizens Sav. & L. Ass’n vs Topeka, 20 Wall. 655.

The “Topeka case” was in no sense an authority upon the facts in Jones vs Portland, supra.

For all the purposes of this case it may be conceded that a municipality has no lawful authority to exact money from its taxpayers for the purpose of turning it over to a private concern as a *bonus* or *gift* or *gratuity*, or to support a business owned and conducted entirely by *private enterprise*. Laws under which the property owners of a community may, by means of taxation, be required to pay money to be used for any such purposes are, we concede, unconstitutional under the Fourteenth Amendment. In the “Topeka case,” supra, after reviewing the authorities, this court said:

“We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a *public purpose*. It may not be easy to draw a line in all cases so as to decide what is public business in this sense and what is not.”

The business involved in the "Topeka case" was purely *private business owned and conducted for profit, the profits inuring to the owners of the business and not to the public*. That case, therefore, is in no sense an authority upon the questions with which this court is now dealing.

Nearly all the numerous cases cited by appellants' counsel in their voluminous brief upon this branch of the case were cases in which was involved simply the right or power of municipalities to raise money by taxation to be paid over as a gift, bonus or gratuity to business enterprises of a *purely private nature*—enterprises in which the public had no direct interest.

In the "Topeka case," supra, the business to be supported or benefitted by public taxation was, as stated, *purely private business* carried on, not in the name nor for the benefit of the public generally, but for the individuals who owned and conducted the business.

When the cases are analyzed it will, we think, be found that this court has enjoined taxation, or the use of the public funds, under the provisions of the Fourteenth Amendment only where the funds were to be used not in the maintenance of a business carried on by the state or a municipality, but where the business in question was privately owned and carried on for the profit of the owners.

In the "Topeka case," supra, it was proposed to pay over to the owners of a private enterprise moneys derived from the sale of the municipal bonds in question. In other words, such moneys were to be given to a purely private enterprise as a bonus or gratuity. Clearly, cases of that nature

have no bearing upon the question with which this court is now dealing.

It is conceded, or at least the facts appearing in the record conclusively show, that the business in which the state proposes to engage is purely *state business* as distinguished from *private business*; that the business is to be conducted by the state for the benefit of all the people in the state, and that no individual is to have any interest in the business except the interest that he derives incidentally from being a citizen and taxpayer of the state.

If the business in question is privately owned and carried on solely for the profit of the individuals owning it it is, under all the authorities, *private business* even though the public derives, incidentally, benefits therefrom.

If on the other hand the business is *publicly owned* and carried on for the benefit and welfare of all the people and is such a business as is calculated to promote the general welfare of the community it is *public business* even though the same kind of business is carried on by private enterprise, and under all the authorities, it is not material that such *public business* is conducted in competition with privately owned business.

In *Holton et al vs City of Camilla*, 134 Ga. 560-68 S. E. 462, the court, in substance, said, that the furnishing of ice to the community was a public business and that the act was not in violation of the provisions of the state constitution that private property could not be taken without due process of law. See also to the same effect

Sun Printing etc. Assoc. vs N. Y. 40 N. Y.
Supp. 607

in which the court said:

“In considering this question it must be premised that cities are not limited to providing for the *strict necessities* of their citizens. Under legislative authority, they may minister to their comfort, health, pleasure or education. They are not limited to policing the city, to paving its streets and providing it with light, water, sewer, docks and markets. They may also be required by the sovereign power to furnish their citizens with schools, hospitals, dispensaries, parks, libraries and museums, with zoological and botanical and other gardens. They may thus even gratify our ears with music and summer afternoons minister to our comfort by providing us with baths. Expenditures in all these transactions under legislative authority have never been disputed. Where, then, shall we draw the line? *It would be very simple to draw it at those purposes for which precedent in the past can be found and to exclude all others.* This test would be easy of application but would be essentially vicious and erroneous. *Growth and extension are as necessary in the domain of municipal action as in the domain of the law. New conditions constantly arise which confront the legislature with new problems.* As the structure of society grows more complex needs spring up which never existed before. These needs may be so general in their nature as to affect the whole country or the whole state or they may be local and confined to a single county or municipality. In any case it is the duty of that legislative body which has the power and jurisdiction to apply a remedy. To hold that the legislature of this state, acting as the *parens patriae* may employ for the relief or welfare of the inhabitants of the state only those methods and

agencies which have proved adequate in the past would be a narrow and dangerous interpretation to put upon a fundamental law. No such interpretation has thus far been placed upon the organic law by the courts of this state. Whenever a question has been considered it has been universally treated in the broadest spirit."

This decision was sustained by the Court of Appeals of New York. 152 N. Y. 257.

In 1913 the supreme court of the State of California in *Egan vs City and County of San Francisco et al*, 165 Cal. 576—133 Pac. 294, held that it was competent for the authorities of the city of San Francisco to establish, maintain and operate a theatre by general taxation for the convenience, education, amusement and recreation of the people. As will be seen, in discussing the question, the court said:

"In endeavoring to ascertain whether the arrangement here sought to be consummated (this arrangement was to lease the property of the city to a private company) is authorized, we need not consider, at any length, the contention of the appellant that the construction and conducting of an opera house is not, under any circumstances, a municipal function. Even without relying upon a specific provision of the San Francisco charter to be mentioned hereafter we should hesitate to say that the providing of a place for the production of musical performances was not within the proper scope of municipal activities *as now understood*. The trend of authority, in more recent years, has been in the direction of permitting municipalities wider range in undertaking and promoting the public welfare or enjoyment. Thus the appropriation of money for public concerts has been held to

be proper under the statute authorizing appropriations for armories for the soldiers and sailors and for other public purposes. (*Hubbard vs Tauton*, 140 Mass. 467—5 N. E. 148). So too the erection of an auditorium has been properly regarded as falling within the purposes for which a municipal corporation may provide by charter. (*Denver vs Hallett*, 34 Colo. 393—83 Pac. 1066). Similar views have been expressed in a case involving the levy of taxes for the purpose of building a hall to be used as a memorial to soldiers and sailors who served in the War of the Rebellion. (*Kingham vs Brockton*, 153 Mass. 255). Generally speaking, anything calculated to promote the education, recreation or pleasure of the public is to be included within the legitimate domain of public uses.

“Assuming then, that authority to erect and conduct an opera house may be conferred upon a city, the question whether a given municipality has that authority must be answered by a reference to the charter or law defining the powers of the particular municipality. The rule is elementary that municipal corporations have only the powers expressly conferred and such as are necessarily incident to those expressly granted, or essential to the declared objects and purposes of the corporation, etc.”

If the establishment and maintenance of a theatre for the convenience, education, amusement and recreation of the people is a “public use” and the “general welfare” of the people is thereby promoted how much more so would be the establishment of a half dozen flour mills properly located in the State of North Dakota and owned and operated, not as private enterprises, but as public enterprises and for the benefit of all the people of the state?

If the test is, "Will the *general public welfare* be promoted by the establishment and conduct of the given business," and under that test a theatre may be maintained at public expense and with funds raised by taxation there should, we think, be no question but that flour mills and elevators which are essential to the business and welfare of most of the people of North Dakota would also be *public business* and therefore maintainable by taxation.

We are aware that the supreme court of Ohio in *State vs Lynch*, 88 Ohio St. 71, held that a municipality has no right to tax its citizens to maintain a moving picture show. But in that case the court based its decision, not upon the Fourteenth Amendment to the Federal Constitution but upon the Constitution of the State of Ohio. And even in that case the decision was by a divided court.

We are also aware that in a number of cases the supreme court of Massachusetts held that a municipality had no right to use public funds to carry on a business such as is ordinarily carried on by private individuals and where it is not shown that there is a *pressing public necessity* for the municipality to engage in the particular business. But in those cases the action of the court was controlled by the provisions of the Massachusetts Constitution. We have read these decisions but we did not find that in any of them the decision was based on the Fourteenth Amendment to the Federal Constitution. And in this connection we may say that we need not spend time arguing that the action of the State of North Dakota or of its officials was in no wise controlled by the Constitu-

tion of Massachusetts or the Constitution of Ohio.

In the court below appellants' counsel cited the case of *State vs Nelson County*, 1 N. D. 88.

All that was decided in that case was that the county *could lawfully issue bonds to procure seed grain for needy farmers residing therein*. The legislation was sustained on the ground that it was a measure intended for the "necessary support of the poor." Discussing the question the court, among other things, said:

"But where the legislature assumes, in the guise of taxation, to compel 'A' to advance his private means to aid 'B' in the prosecution of a *purely private enterprise*, the courts will not hesitate to perform the duty of declaring such tax void, etc."

Very clearly that decision is not applicable here. As will be seen, in support of its decision the court cited the "*Topeka case*," *supra*. It also cited *Parkersburg vs Brown*, 106 U. S. 487. That case, as will be seen, simply holds that the legislature of West Virginia could not authorize the City of Parkersburg to issue its bonds *for the purpose of lending the same to persons engaged in manufacturing*. The North Dakota court also cited *Cole vs City of LaGrange*, 113 U. S. 1. That case simply holds that,

"The legislature of Missouri has no constitutional power to authorize the city to issue its bonds *by way of donation* to a private manufacturing corporation."

The North Dakota court in support of its decision also cited the case of *Coates vs Campbell*, 5 N. W. 366 (Minn.). In that case the supreme court of Minnesota simply held that,

“An act authorizing the issue of bonds of a village corporation to aid in the construction of a dam for the purpose of improving a *private water power* is unconstitutional as providing for public taxation for a private use.”

The North Dakota court also cited the case of *Lowell vs Boston*, 111 Mass. 454. In that case the Massachusetts court simply held that,

“An act of the legislature of Massachusetts authorizing the city of Boston to issue bonds and lend the proceeds on mortgages to the owners of land, is unconstitutional.”

The case of *Lowell vs Boston*, *supra*, has been frequently cited in support of the proposition that taxation cannot be resorted to for the purpose of raising money for a *purely private use*. As seen, in that case the money to be raised by taxation was to be loaned on mortgages to the owners of the land in question.

Appellants' counsel also cite the case of *Dodge vs Mission Township*, Shawnee County, Kansas, 107 Fed. 827. (8th circuit). That case must be considered in the light of its own facts. In the opinion, it is true, Judge Sanborn says:

“The legislature cannot make a *private purpose* a *public purpose* or draw to itself or create the power to authorize a tax or a debt for such a purpose by its mere fiat.”

The foregoing language of Judge Sanborn must be considered in the light of the facts with which the court was dealing. What were the facts? Briefly stated, Mission Township in Shawnee County, Kansas, under an Act of the Kansas legislature sought to aid, by taxation, a *private concern* engaged in the business of manufacturing

sorghum cane into sugar and syrup. In other words, the question was whether a municipality could raise money by taxation for the purpose of handing it over *as a subsidy* to the owners of a privately owned and conducted business. We have no quarrel with the Circuit Court of Appeals in that case. We have read all the decisions cited by the court in that case and we find that in all of them the business or enterprise to be aided by the funds sought to be raised by taxation was purely *private business*, business in which neither the state nor any municipality had any interest, or over which the state or any municipality had any control. In other words, in each of these cases the money sought to be raised by taxation was to be turned over to a private business concern as a bonus or gratuity. In

Munn et al vs Ill. et, 94 U. S. 113.

Budd vs N. Y., 143 U. S. 517.

Brass vs Stoesser, 153 U. S. 391

this court held that;

“When private property is devoted to a public use, (such for instance as a grain elevator) *it is subject to public regulation.*”

It is upon the principle laid down in these cases that Congress or a state legislature may *regulate* the business of conducting elevators that are receiving and shipping grain for the public generally, or can regulate the business of common carriers which, in their nature, are quasi public corporations.

We do not, however, contend that those cases are controlling here as they go only to the power of the state or nation to regulate private business of a quasi public nature but do not deal with the

question of the power of a state *to establish and conduct* a business for the purpose of promoting the general welfare—a business which the state owns and conducts and in which private parties have no interest except the incidental interest which citizens of the state have in the carrying on of the particular business by the state.

Appellants' counsel cite *Osborne vs the County of Adams*, 106 U. S. 181. That case, like every other case, must be considered with reference to its own particular facts. That case dealt with an act of the Nebraska legislature, the purpose of which was to enable counties, cities and precincts to borrow money on their bonds or to issue bonds to aid in the construction or completion of works of internal improvement in the state and to legalize bonds already issued for that purpose. The purpose for which the money to be raised by the sale of the bonds was

“To aid in the construction and completion and to furnish the motive power for a steam custom grist-mill.”

This grist-mill was privately owned and the money to be furnished by the municipality was, in effect, to be given to a private concern owning and operating the grist-mill.

Clearly that case has no application to the facts in the case at bar. That case should have been read in connection with the case of *Township vs Beasley*, 94 U. S. 161. The facts in that case were that State of Kansas passed an Act authorizing towns and counties to issue bonds to aid in building bridges and to aid in the construction of railroads, water-power, “or other works of internal

improvement." The state also passed another Act declaring all custom grist-mills to be "public mills" and regulated their management. Acting under this legislation the township of Burlington in Coffey County, Kansas, issued certain of its bonds, and in due course Beasley became the owner thereof and the action was to recover on those bonds; and the question involved was whether the purpose for which the bonds were sold was a *public purpose*, and, as will be seen, the court held with the plaintiff. Discussing that question, as will be seen, the court in that case (*Twp. vs Beasley*, 94 U. S. 161) said:

"Under our recent decision in *Munn vs Ill.*, 94 U. S. 113, and other cases upon kindred subjects it would be competent to the legislature of Kansas to regulate the toll to be taken at these mills. It is a reasonable construction of this statute to hold that aid to this mill is aid of a *public work* within its meaning, and that the construction and equipment of the steam grist-mill was an *internal improvement*."

"The case of *Loan Asso. vs Topeka*, 87 U. S. 460—20 Wall. 661, will judge these bonds to be legal. The point is there expressly made that bonds, when issued for a *public purpose*, a *public use*, which it is the right and the duty of the state government to assist are valid. The issue we are considering falls within this definition."

In our view this case is not entirely in harmony with other decisions of this court, but while it is referred to in *Osborne vs County of Adams*, supra, it is not overruled. The case while not directly in point on the question involved in the case at bar is, nevertheless, instructive upon the ques-

tion as to what is and what is not a public use or a public purpose.

Undoubtedly the mills and elevators and other enterprises contemplated by the legislation involved in this litigation *will be under the direct control and management of the state through its officials and will be conducted for the general benefit of the people of the state.*

If, then, public funds may lawfully be appropriated to assist in the construction and maintenance of flour mills that are to be *privately owned but subject to state control* on what principle may not public funds raised by taxation be lawfully used to construct and operate flour mills *to be owned and controlled by the state for the benefit of all the people of the state?*

We respectfully submit that there is greater reason to sustain the legislation involved in the case at bar than there was to sustain the legislation involved in the case of *Twp. vs Beasley*, *supra*. And yet such legislation was sustained by this court.

In *Commonwealth vs Pittsburgh*, 183 Pa. St. 202—63 A. S. R. 752, the court said:

“A city has the right to appropriate money to a committee of citizens appointed by a chamber of commerce and ratified by the city authorities to defray the expenses of a survey for a ship canal and to secure information as to the benefit which would be derived by the city from the canal although the constitution forbids municipalities to appropriate money or loan their credit to any corporation, association, institution or individual.”

Discussing the question as to whether the purposes for which the money was appropriated w

a public or purely private purpose the court said:

"In this case the city of Pittsburg does not propose to build the canal, or to loan or appropriate money for that purpose, or to join with any person, association, or corporation for that purpose. It simply appropriates the thousand dollars—a very small sum for the city in view of the great object aimed at—for surveys, getting information, etc., to ascertain whether a ship canal between Pittsburg and Lake Erie is practicable, and would be a benefit to the city.

"That such a ship canal is practicable, and would be of very great benefit to the trade and industries of Pittsburg, must be taken as true, in this case, for the provisional committee so reported, and it is so stated in the ordinance of July 11, 1895, and is not controverted by the controller in his answers. There can be no doubt, if practicable, it would be of immense importance to Pittsburg to have a ship canal from here to Lake Erie."

If the city of Pittsburg could lawfully appropriate public funds for the purpose of inducing a private person or a private corporation to construct the canal in question we confess that we are unable to perceive on what principle the city could not construct the canal itself as a municipal enterprise.

It has been repeatedly decided by this court that the building of a railroad is a *public enterprise*, and because it is a public enterprise—because its construction will tend to promote the general public welfare—(unless prevented by state law or state constitution) municipalities may tax its property holders to raise funds to be appropriated in aid of the construction of railroads.

Washington Co. vs Williams, 111 Fed. 801;
Pine Grove Twp. vs Talcott, 19 Wall. 666-667.

In the case last cited Mr. Justice Swayne pointed out that legislation authorizing such donation had been sustained in nineteen out of twenty-one states.

Dillon on Municipal Corp. Vol. 2 (5th ed.)
Sec. 884 et seq.

In the court below appellants' counsel cite and urged upon the attention of the trial judge the case of Covington vs Kentucky, 173 U. S. 237, in support of the contention that was there made and is made here that "public purposes" mean "governmental purposes."

We can read nothing of the kind from the decision in that case. The case came to this court on an appeal from the decision of the supreme court of Kentucky, and in deciding the case this court, among other things, said:

"However much we may doubt the soundness of any interpretation of the state constitution implying that lands and buildings are not public property used for public purposes when owned and used under legislative authority by a municipal corporation, one of the instrumentalities or agencies of the State, for the purpose, and only for the purpose, of supplying that corporation and its people with water, and when the net revenue from such property must be applied in the improvement of public ways, we must assume, in conformity with the judgment of the highest court of Kentucky, that section 170 of the constitution of that Commonwealth cannot be construed as exempting the lands in question from taxation. In other words, we must assume that the phrase 'public purposes' in that section means 'governmental purposes', and that the

property here taxed is not held by the city of Covington for such purposes but only for the 'profit or convenience' of its inhabitants and is liable to taxation at the will of the legislature unless at the time of the adoption of the constitution of Kentucky it was exempt from taxation in virtue of some contract the obligation of which is protected by the Constitution of the United States.

"The fundamental question in the case then is whether at the time of the adoption of that constitution the city of Covington had, in respect of the lands in question, any contract with the State the obligation of which could not be impaired by any subsequent statute or by the present constitution of Kentucky adopted in 1891. If the exemption found in the act of 1886 was such a contract, then it could not be affected by that constitution any more than by a legislative enactment.

"We are of the opinion that the exemption from taxation embodied in that act did not tie the hands of the Commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation. The act of 1886 was passed subject to the provisions in a general statute of Kentucky, above referred to, that all statutes 'shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed.' If that act in any sense constituted a contract between the city and the Commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract."

As will be seen, this court disagreed with the supreme court of Kentucky on the question as to whether the use to which the property in question was put was a public use but sustained the decision on the ground that the question of taxation

was one exclusively under the control of the state, and that when the act under which the property was acquired was passed the Constitution of Kentucky provided that all privileges and franchises granted by the state authority could be changed or repealed, and this court simply held that inasmuch as this constitutional provision was in force when the act authorizing the city to acquire the property in question was passed the subsequent constitutional provision did not "impair the obligation of any contract," and that the construction which the supreme court of Kentucky had placed on the constitution of that state was binding upon this court.

Taking the decision altogether it is in no sense an authority for the proposition that "public purposes" mean "governmental purposes."

In *Walker vs City of Cincinnati*, 21 Ohio St. 14, the supreme court of Ohio defined the term "public purposes" as follows:

"As the terms are used in reference to taxation, what is for the 'public good,' and what are 'public purposes' and what does constitute a 'public purpose,' are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of their representatives."

In *Jarrott vs Moberly*, 13 Fed. Cas. 366-367, the court said:

“Since it is law in Missouri that aid by the issuance of municipal bonds can be constitutionally given to railroad companies it would seem to follow that they might also be issued to secure the erection of the railroad and machine shops, and that such purposes would be ‘public purposes’ in such a sense as to justify compulsory taxation to pay the debt.”

This case, to be sure, was decided in view of the constitution of Missouri, but the question of the validity of the constitution of Missouri, the same as the question of the validity of the statutes of Missouri, must be determined with reference, among other things, to the fourteenth amendment to the Federal Constitution. In *Walker vs City of Cincinnati*, supra, the court said:

“Courts cannot say that a statute authorizing a city to borrow money, etc., for building a railroad to be owned by it, is not for a ‘public purpose’.”

Discussing the question of the constitutionality of an act “To provide for the organization and government of irrigation districts, etc.,” the supreme court of California in *Turlock Irrigation Dist. vs Williams*, 18 Pac. 379 (Cal.) said:

“The results to be derived from a drainage law, and one which has for its purpose the irrigation of immense bodies of arid lands, must necessarily be the same, as respects the public good. The one is intended to bring into cultivation and make productive a large acreage of land which would otherwise remain uncultivated, and unproductive of any advantage to the state, being useless, incapable of yielding any revenue of importance toward the support of the general purposes of

state government, by reason of too much water flowing over or standing upon or percolating through them. The other has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil,—desert-like in character, much of it,—which, if water in sufficient quantity can be conducted upon and applied to it, may be made to produce the same results as flow from the drainage of large bodies of swamp and overflowed lands. Such a general scheme, by which immigration may be stimulated, the taxable property of the state increased, the relative burdens of taxation upon the whole people decreased, and the comfort and advantage of many thriving communities subserved, *would seem to redound to the common advantage of all the people of the state, to a greater or less extent.* It is true that incidentally private persons and private property may be benefitted, but the main plan of the legislature, viz., the general welfare of the whole people, inseparably bound up with the interests of those living in sections which are dry and unproductive without irrigation, is plain to be seen pervading the whole of the act in question. *This is not a law passed to accomplish exclusive and selfish private gain. It is an extensive and far-reaching plan, by which the general public may be vastly benefitted; and the legislature acted with good judgment in enacting it.* ‘If the use for which property is taken be to satisfy a great public want or public exigency, it is a public use within the meaning of the constitution, and the state is not limited to any given mode of applying that property to satisfy the want or meet the exigency’.”

If funds may lawfully be raised by general taxation to finance an irrigation project for the purpose of increasing the value of arid lands and increasing the quantity of food products produced

we are unable to perceive why funds may not be raised in the same way to establish a business condition that will *increase the value of farm products after they are produced*. In principle there is no distinction between the two cases. It is our contention that *if the general welfare of the whole community* will thereby be promoted the state, in its sovereign capacity, may lawfully, by general taxation, raise and appropriate funds to accomplish either purpose.

If the state may lawfully appropriate public funds accumulated by taxation to carry out an irrigation project for the purpose of transforming desert lands into productive fields and thereby improve agricultural conditions why may not the state appropriate money accumulated in the same way to establish flour mills to the end that the grain grown in the state may be manufactured therein with the result that fertilizers will be created that will increase the fertility of the soil and thereby increase the production of grains and other agricultural products?

In the late case of *Saunders et al vs Arlington et al*, 147 Ga. 581—94 S. E. 1022 (decided in Jan., 1918), the supreme court of Georgia held that the charter of the town of Arlington confers on the authorities of the municipality the power to establish and maintain an "ice-plant" and "cold storage" within such municipality for the benefit of the inhabitants thereof, whenever they have complied with the preliminary steps for such purpose as provided by the constitution and laws of the state. In the earlier case of *Holton vs Camilla*, supra, as already shown, the supreme court of

Georgia had held that the village could lawfully engage in the business of maintaining a public ice plant. In the latter case the court said:

“If establishing an ice plant by express authority is for the public good and can be upheld, we fail to see why the establishment and maintenance of an ice plant and cold storage system for the municipality is not conducive to the health, comfort, and convenience of the citizens, and a public improvement and for the benefit of the town; and why such improvements do not fall within the power conferred by the legislature in the above-quoted sections of the municipal charter now under review. We think such power is conferred by the legislature; and the matter is in the hands of the legal voters of the municipality as to whether they will exercise the power conferred on them and the municipality to issue bonds for the purpose of establishing the ice plant and cold-storage system.”

In the case of *Andrews vs City of South Haven*, 187 Mich. 294—153 N. W. 827, the supreme court of Michigan decided that under the constitution and statutes of that state authorizing municipalities to acquire and operate gas and electric light plants a city which operated its own electric light plant was entitled to take on those things naturally connected with and belonging to the running of such a business and so might sell, if necessary, light fixtures. Discussing the question the court said:

“The power to engage in this municipal business activity for the public welfare is necessarily conferred in general terms. To go into details of administration and specify each particular thing which could or could not be done would be unwise and practically impossible. As to details and methods of con-

ducting such authorized business, involving exercise of special knowledge and business judgment, there must be implied powers. A strict, illiberal, or narrow construction which might hamper the exercise of a reasonable discretion by the municipal authorities in such matters, because the power is given in few words, is not, with perhaps a few exceptions, the tendency of decisions in most jurisdictions. The courts as a rule are not disposed to interfere with the management of an authorized business, conducted by the municipal authorities presumably in the interest and for the benefit of the city and its inhabitants, unless dishonesty or fraud is manifest or the vested power which is implied has been clearly exceeded or grossly abused."

It must be conceded that the business of selling "light fixtures" is one that has heretofore commonly been carried on by private enterprise; and we must, we think, assume that individuals and private business corporations are now extensively engaged in that business. If a municipality can lawfully engage in the business of maintaining an ice-plant and a cold-storage system and may also engage in the business of selling light fixtures we can see no reason why the State of North Dakota cannot lawfully engage in the business of operating a flour mill or a grain elevator. If in the former cases the expenditure of the public funds is for "public purpose" we can perceive no reason why the expenditure of the public funds in the latter case is not also for a public purpose.

The constitution of South Dakota contains a provision, Article 3, Section 1, as follows:

"Neither the state nor any county nor municipality shall loan its credit, make donations in aid of individual corporations or be-

come the owner of the capital stock of any such corporation, nor shall the state engage in any work of internal improvement."

In 1917 the legislature of South Dakota passed an Act authorizing cities to acquire, construct, equip and operate telephone systems. In the case of *Spangler vs City of Mitchell*, 35 S. D. 335—13 N. W. 339, the question as to whether under the constitution and statutes above referred to a municipality in South Dakota could lawfully engage in the business of constructing and maintaining a telephone system was discussed, and in a very able opinion the court decided that the municipality had lawful authority to construct and maintain the telephone system and to use the funds of the state raised by taxation for that purpose. It does not appear that the case was decided with reference to the effect of the Fourteenth Amendment to the Federal Constitution. However, we are not at liberty to assume that a case of so much importance was decided without reference to that amendment. If the appellees can be enjoined from constructing and operating flour mills in North Dakota under the provisions of the Fourteenth Amendment it would seem that a municipality in South Dakota could be enjoined from constructing and operating a telephone system at public expense.

Constructing and maintaining telephone systems is a business that is ordinarily carried on by private enterprise. The business of conducting telephone systems employs thousands of men and millions of dollars of capital. As stated, the business is ordinarily carried on by private enter-

prise. The business is in no sense "governmental" in the restricted sense of that term.

In *Union Ice & Coal Co. vs Town of Ruston*, 135 La. 898—66 So. 262, the supreme court of Louisiana held that a municipality in that state could not lawfully engage in the business of manufacturing and selling ice. That decision, however, was based upon the peculiar wording of the Louisiana constitution. That constitution provides, in substance, that the taxing power could be exercised by the general assembly

" * * * For state purposes and by parishes and municipal corporations and public boards under authority delegated by the general assembly for parish, municipal and local purposes *strictly* public in their nature."

The supreme court of Louisiana held that by the use of the word "strictly" the constitution makers had clearly manifested an intention to confine the activities of municipalities within the narrow limits in which they had been theretofore confined in that state.

That case is in no sense an authority in support of the contention that under the Fourteenth Amendment to the Federal Constitution a state or municipality within the state cannot engage in business which heretofore has ordinarily been carried on by private enterprise.

As stated, nearly all the decisions cited by appellants' counsel in their extended brief were cases in which the states or municipalities involved attempted to raise money by general taxation for the purpose of turning the same over to some privately owned and privately conducted business.

enterprise. Manifestly those cases have no application to the questions with which we are dealing in the case at bar.

It is conceded that the elevators and flour mills contemplated by the legislation in question are to be owned and operated by the state for the benefit of all the people in the state and that no private individual, company or corporation is to receive any benefit from the business except such incidental benefit as may accrue to them by their being residents within the state. That clear distinction between the "Topeka case" and other similar cases and the case at bar should be kept clearly and steadily in mind.

JUDICIAL NOTICE.

In the opinion filed by the learned trial Judge (Tr. p. 80 fo. 111 et seq.) reference is made to the conditions existing in North Dakota with respect to the production, transportation, grading, marketing and distribution of the farm products of the state.

Throughout their extended brief appellants' counsel make frequent complaint that in the decision of the case the trial court took judicial notice of existing conditions, and they contend that, to some extent at least, the decision was based thereon. We respectfully submit that these complaints are without merit.

Under section 7938 North Dakota Code 1913 the courts will take judicial notice of the following subjects:

Sub. div. 7. Of the course of the seasons and of husbandry.

Sub. div. 8. Of the succession of the seasons as in relation to vegetables and animals, and the general course of agricultural crops, matured so as to be severed.

Sub. div. 9. Of what places are great marts of trade, such as New York, Chicago and St. Louis.

Sub. div. 10. Of the distance between well known places in the United States and the ordinary time of railroad trains.

Sub. div. 12. That there are facilities for business, by railroad, telegraph and telephone, between two certain places.

Sub. div. 29. Of the universal usage of merchants and ordinarily of a common law custom.

Sub. div. 30. *Of whatever ought to be generally known within the limits of the court's jurisdiction.*

Sub. div. 32. Of transactions and objects which form a part of the history and geography of the country.

Sub. div. 33. Of matters of public history affecting the whole people.

Sub. div. 35. Of the history of a country, its topography and general condition.

Sub. div. 36. Of the boundaries of the state and the navigability of its large rivers.

Sub. div. 39. Of what is commonly known in the various manufactures and industries.

Sub. div. 40. Of a manufactured article which has for many years been in common use throughout the country.

Sub. div. 53. Of the custom of mutual credits in business houses.

Sub. div. 57. Of the legislative journals and the modes by which domestic laws are authenticated.

Sub. div. 58. Of the statute books and journals of the houses of the legislature.

Sub. div. 59. Of the journal of each branch of the general assembly.

Sub. div. 60. *Of such contemporaneous history as led up to and probably induced the passage of a law.*

Sub. div. 61. Of the history of every statute in its progress through the legislature.

Sub. div. 62. Of the true reading of a statute by referring to the original act on file in the office of the secretary of state.

Sub. div. 68. Of such matters of common knowledge and science as may be known to all men of ordinary understanding and intelligence.

Sub. div. 76. Of the laws of nature, the measure of time and the geographical divisions and political history of the world.

“The general rule is that matters of history, if sufficiently notorious to be subject to general knowledge, will be judicially noticed. The reason for this recognition has been said to be that the facts of history enter into the construction of the laws, and so must be in the knowledge of the court whose duty it is to construe them. Naturally common knowledge is more detailed in regard to the history of things close at hand than of things remote, so it may safely be said that matters of public history concerning the United States or the particular state where the court has jurisdiction, and affecting the whole people, will always be judicially noticed.”

Ruling Case Law Vol. 15, p. 1088 et seq.

See also numerous cases cited in note 14 on

page 1089.

See also extended note to *Green vs Lineville Drug Co.*, 124 Am. St. R. sub. div. "C", p. 24; sub. div. "F", p. 30; sub. div. "H", p. 32; sub. div. "I", p. 35; sub. div. "R", p. 52; sub. div. "S", p. 54.

All the facts referred to by the learned trial judge in his opinion were facts within the common knowledge of the people of North Dakota. They were all matters concerning which the people had for years taken a deep interest. They were facts and conditions upon which a great political party was founded—a party that has controlled the political affairs of the state for more than three years. It would be idle, therefore, to contend that the facts referred to were not all within the common knowledge of the people of the state. *They were all matters of contemporaneous history and led up to and induced the passage of the laws and the adoption of the constitutional provisions involved in this litigation.* It was therefore the duty of the trial court to take judicial notice of these facts and conditions. It has frequently been said that "A judge should not pretend to be more ignorant than the average man." A judge should not close his eyes to what all the rest of the world can plainly see. It was proper for the trial court to take judicial notice of the efforts that in years past had been put forth by the people of North Dakota to secure more just and equitable conditions in the transportation, trading, marketing and distribution of their products. These were all historical facts, so far at least as the State of North Dakota was concerned. They constituted "The contemporaneous his-

tory that led up to and induced the passage of the laws.”

It is noticeable that appellants' counsel nowhere claim that the facts and conditions recited in the opinion of the learned trial Judge were not all true. They simply contend that they were not such facts and conditions as the court could know judicially. This contention, we believe, is not sustained by the common law or by the statute law of North Dakota.

CONDITIONS IN NORTH DAKOTA THAT BROUGHT ABOUT
THE LEGISLATION INVOLVED.

As will be seen, reviewing the historical aspect of the case the learned trial court (Tr. p. 80, fo. 111 et seq.) said:

“The people of North Dakota are farmers, many of them pioneers. Their life has been intensely individual. They have never been combined in corporate or other business organizations to train them in their common interests or promote their general welfare. In the main they have made their purchases and sold their products as individuals. Nearly all their livestock and grain is shipped to terminal markets at St. Paul, Minneapolis and Duluth. There these products pass into the hands of large commission houses, elevator and milling companies and livestock concerns. These interests are combined not only in corporations, chambers of commerce, boards of trade and interlocking directorates but in the millions of understandings which arise among men having common interests and living through long terms of years in the daily intercourse of great cities. These common understandings need not be embodied in articles of incorporation or trust agreements. They may be as intangible as the ancient ‘powers of the air’. But they are as potent in

the economic world as those ancient powers were thought to be in the affairs of men. It is the potency of this unity of life of men dwelling together in daily intercourse that has caused all nations thus far to be governed by cities.

“As North Dakota has become more thickly settled and the means of intercourse have increased the evils of the existing marketing system have been better understood. No single factor has contributed as much to that result as the scientific investigations of the state’s Agricultural College and the federal experts connected with that institution. That work has been going on for a generation and has been carried to the homes of the state by extension workers, the press and the political discussion of repeated political campaigns. The people have thus come to believe that the evils of the existing system consist not merely in the grading of grain, its weighing, its dockage, the price paid and the disparity between the price of different grades and the flour producing capacity of the grain. They believe that the evil goes deeper; that the whole system of shipping the raw materials of North Dakota to these foreign terminals is wasteful and hostile to the best interests of the state. They say in substance:

“1. The raw materials of the state ought to be manufactured into commercial products within the state. In no other way can its industrial life be sufficiently diversified to attain a healthy economic development.

“2. The present system prevents diversified farming. The only way that can be built up is to grind the grain in the state which the state produces—keep the by-products of bran and shorts here and feed them to livestock upon the farms of the state. In no other way can a prosperous livestock, dairy and poultry industry be built up.

"3. The existing marketing system tends directly to the exhaustion of soil fertility. In no way can soil depletion be prevented except to feed out to livestock at least as much of the by-products of the grain raised upon the ground and thus put back into the soil in the ground and thus put back into the soil in the form of enriched manures, the elements which the raising of small grains takes from it.

"The present movement began at least as far back as 1911. In that year an amendment of the State Constitution was initiated authorizing the state to acquire one or more terminal grain elevators and maintain and operate the same in such manner as the legislative assembly should prescribe. That amendment was adopted in 1913. From that time forward the subject of marketing the products of the state has been the main theme of public thought. The movement has gone straight forward, the constitution has been repeatedly amended including the amendments here assailed—all having for their object the correction of the existing system of marketing the state's products. Year by year the conviction has deepened, in steadily increasing majorities, that public ownership of terminal elevators, mills and packing houses is the only effective remedy to correct the evils from which they believe themselves to be suffering. *Their decision is not a popular whim but a deliberate conviction arrived at as a result of full discussion and repeated presentations of the subject at the polls. The acts which the court is asked to restrain are not those of public officials, who are pursuing enterprises of their own devising. Those acts express not simply the judgment of the state legislature. To authorize their enactment the people of the state have re-drawn their Constitution. That is the highest and most deliberate act of a free people. These constitutional amendments authorize and direct the*

state to do what the defendants are threatening to do. Their acts are simply the carrying out of the mandate of those constitutional amendments.

“It is hopeless to expect a population consisting of farmers scattered over a vast territory as the people of this state are to create any private business system that will change the system now existing. The only means through which the people of the state have had joint action is their state government. If they may not use that as the common agency through which to combine their capital and carry on such basic industries as elevators, mills and packing houses and so fit their products for market and market the same they must continue to deal as individuals with the vast combinations of these terminal cities and suffer the injustices that always exist where economic units so different in power have to deal the one with the other.

“The foregoing is what a majority of the people of the state have been persuaded to believe by those whose leadership they trust. Whether their grievances are real or fancied, whether their remedies are wise or foolish, are subjects about which the court is not concerned. The only object in trying to set them forth has been to place the constitutional amendments and laws here assailed in their true relationship to the life and thought of the people by whom they were adopted.”

It is a matter of common knowledge that North Dakota is essentially an agricultural state. We have no forests, and therefore no lumber industries. Aside from lignite coal we have no mining industry. We have no commerce except commerce in agricultural products. Our manufacturing industries are negligible. Substantially every dollar that comes into the state of North Dakota

comes from the sale of agricultural products. In a very literal sense the whole population of North Dakota lives on agriculture.

From the earliest settlement of the state the grain growers and stock raisers of North Dakota have been convinced that in carrying on their business they were not getting a square deal, and every well informed man in the state knows that there was justice in that complaint. In transporting, marketing and distributing the products of the farms of North Dakota there have been too many middlemen between the producer and the consumer—too many men have stood in the currents and gathered toll from products which they did nothing to create; and the result has been that while the consumer has paid exorbitant prices for these products there has been very little left for the producer.

Furthermore it is a fact well established by experience and scientific investigation that to be profitable in the long run stock raising and grain growing must be conducted together. There must be grain to fatten the stock and there must be stock to enrich the land or in the end the fertility of the soil will be gone. Under the present system of distribution less than five per cent of the wheat raised in North Dakota is manufactured in the state; the balance is shipped in bulk to St. Paul, Minneapolis, Duluth, Milwaukee and other grain terminals. As a result the farmer is required to pay freight on the dockage and also on the by-products, to-wit, bran and shorts. The by-products are then either lost to the North Dakota farmer or he is required to pay the transportation

charges on returning it to the state. The only possible way of alleviating this condition is the establishment of flour mills within the State of North Dakota. And after an experience of nearly forty years it is found that private enterprise will not establish flour mills in North Dakota in sufficient numbers to grind the grain grown in the state; and therefore, the only alternative that the North Dakota farmer has is either to continue the old system or to have flour mills constructed and operated by the state.

As the grain business is now organized and conducted there is no possible relief to the farmer from the present situation of affairs and such a situation is intolerable. It spells eventual ruin to the North Dakota farmer. The program outlined in the legislation in question was designed to relieve not only the farmers of North Dakota but the people of North Dakota as a whole from this ruinous situation. If all this is true then the establishment of flour mills and grain elevators in the State of North Dakota and the manufacturing in the State of the grain grown therein has a direct and vital bearing on the welfare and prosperity of the people of the state.

If the test as to whether a business is *public* is, does or will the business promote the general welfare, there can then, we think, be no question but that the business in which the State of North Dakota proposes to engage under the legislation in question is public business.

As shown in the numerous authorities cited, the fact that a given business is one that has heretofore been generally carried on by private enter-

prise is not controlling on the question as to whether the business is public or private. The business of conducting cold-storage plants is usually carried on by private individuals. There are probably not to exceed a dozen fuel yards in the United States conducted by municipalities, but in thousands of towns, villages and cities there are to be found coal and wood yards carried on by private enterprise. Hundreds of thousands of men and hundreds of millions of capital are now and for years have been engaged in the production, distribution and marketing of coal. For more than a century the coal business has been carried on almost exclusively by private enterprise and yet this court squarely held in *Jones vs Portland*, *supra*, that the City of Portland had the lawful right to use funds raised by taxation for the purpose of establishing and conducting the business of buying and selling coal.

In *McCulloch vs Maryland*, 4 Wheaton 316—428, Marshall, Chief Justice, said:

“The only security against the abuse of the power of taxation is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of the right, resting confidently on the interests of the legislature, and on the influence of the constituents over their representatives to guard them against its abuse.”

Jones vs City of Portland, *supra*, sustaining a statute of the State of Maine authorizing cities to

establish and maintain wood, coal and fuel yards by funds raised by taxation is, so far as we have been able to discover, the latest expression of the supreme court on the question as to the power of states to engage or authorize their municipalities to engage in business of a *public nature* but which business has heretofore usually been carried on by private enterprise; and as will be seen, in that case this court squarely held that statutes authorizing the expenditure of public funds raised by taxation to establish and carry on such business are not unconstitutional under the Fourteenth Amendment to the Federal Constitution.

WHETHER LAWS ARE WISE AND EXPEDIENT IS A POLITICAL AND NOT A JUDICIAL QUESTION.

In discussing this question counsel (Appellants' brief p. 99) say:

" * * * we say that today in these days when the power of the state is pressed to such an extent and when the urgency of so-called public purposes rest as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own.

"Political disturbances and emotional action on the part of the people is very apt to bring about radical legislation accompanied by lax construction of what is a public purpose. Therefore, the question is one that should be determined by this court upon its own investigation and according to its own judgment upon the record as presented."

Further discussing the question (Appellants' brief p. 94) counsel say:

"We submit, however, that while the utterances of these courts are entitled to, and will,

receive proper consideration at the hands of this court, yet the question of public use is one that is squarely before this court and must be passed upon according to the facts presented and not according to the views expressed by either the trial judge or the judges of the State Supreme Court which may have been colored by the particular brand of political economy upon which these acts are grounded."

Further on the same subject (Appellants' brief p. 95) counsel say:

"That amendment (the fourteenth amendment) simply protected the citizen by a federal constitutional enactment against enthusiastic legislation on the part of the state and enabled the citizen to invoke the Federal Constitution for protection when private rights were invaded or threatened by legislation, the result of the *vagaries of sociological dreamers*.

"If, in determining the right of the citizen, the act of the state legislature, or the decision of the state supreme court is to govern, then the 14th amendment becomes innocuous, and is but a 'scrap of paper'."

It is doubtless true that a small minority of the people of North Dakota conscientiously believe that the legislation involved in this litigation represents the "vagaries of sociological dreamers." A great majority of the people of the state, however, as shown by their political actions during the past four years, just as conscientiously believe that the legislation involved is wise and expedient and that under its operation the welfare and prosperity of the people of the state will be greatly promoted.

But whether this legislation is wise and expedient or the reverse is a political and not a judicial question. Courts do not concern themselves with

the policy of legislation or its economic wisdom or folly. Those are considerations belonging exclusively to the legislature.

C. B. & Q. Ry. Co. vs McGuire, 219 U. S. 549-569;

Price vs Illinois, 238 U. S. 446, 451, 452;

Rast vs Van Deman & Lewis, 240 U. S. 342-357;

Merrick vs Halsey, 242 U. S. 568, 586, 588.

In the case at bar we are dealing exclusively with the question of the power of the state in its sovereign capacity, and the power of the legislature of the state, as controlled by the Fourteenth Amendment to the Federal Constitution.

A large majority of the people of North Dakota upon full discussion and mature deliberation, to remedy conditions which had become intolerable, amended their constitution and enacted the legislation in question, and now the question as to whether these constitutional provisions and statutes are void as being in conflict with the Fourteenth Amendment to the Federal Constitution is squarely presented to the supreme court.

THE MOTIVES THAT PROMPTED THE LEGISLATION IN QUESTION.

In their otherwise very able brief appellants' counsel indulge in numerous insinuations against the good faith and integrity of those responsible for the constitutional provisions and statutes involved in this litigation; they also by insinuations, thinly disguised, challenge the motives of the judges of the supreme court of North Dakota. Perhaps on the whole this is not surprising. We all know that it is hard for men to see merit in legislation which they have strenuously opposed;

and too often attorneys who have been beaten at tempt to console themselves by raising doubts as to the purity of the motives of the judges. We regret that counsel should have marred their very able and admirable brief by including in it these insinuations.

However, as was said by this court in the late case of *Hamilton vs Kentucky Distilleries & Warehouse Co.* decided on the 15th day of December, 1919, and reported in advance opinions of the supreme court of date January 5, 1920.

"No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute inquire into the motives of Congress.
* * * Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence."

See also numerous cases cited in the opinion referred to above.

IN WHAT KINDS OF BUSINESS MAY STATES AND MUNICIPALITIES LAWFULLY ENGAGE?

Upon this subject appellants' counsel in their brief (p. 160) say:

"Light, Heat, Water, Drainage, Irrigation, Sewerage, Cemeteries, Parks and Recreational places, each and every activity furnishing something to the people that promoted general welfare and for some reason could be much better furnished by the government than by private enterprise."

Why stop with this list? Apparently counsel forget that substantially the same argument that is being made against the validity of the legislation in question in the case at bar was made to the

legislation authorizing states and municipalities to engage in each of the particular lines of business enumerated above. Every attempt on the part of the public acting collectively to engage in any line of business has been met by the same argument. The same argument was made when cities first attempted to establish city owned lighting plants, and the same with respect to city owned water works, and city owned heating plants, and drainage and irrigation projects carried on by the public. The judicial history of this country shows that every attempt on the part of the public to act collectively, either as states or cities or other municipalities, in the establishment of any line of business or work has been strenuously and persistently opposed, and opposed by those whose interest it was to preserve the existing order of things and the existing methods of transacting the given business. On this point counsel (Appellants' brief p. 160) further say:

"It is frequently urged by those who are advocating enlarged powers of government, that times have changed, and that governmental functions are not today what they were a few years ago. That the principles governing the rights of governments in dealing with the citizen have been enlarged in their scope."

Appellants' counsel, as will be seen, then proceeded to deny the correctness of the foregoing proposition. We respectfully submit that the political and judicial history of the United States plainly shows that in their denial counsel are mistaken. The true rule was aptly stated by the

supreme court of Maine in Laughlin vs Portland
supra, as follows:

"The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes because it would be impossible to do so *Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary.* What was clearly a public use a century ago may, because of changed conditions, have ceased to be such today * * * On the other hand, what would not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now."

The foregoing was substantially approved by this court in Jones vs Portland, supra.

There was a time when the education of the people was purely a private affair, each person educating his own children. And the first efforts to establish a system of public schools supported by taxation was met by the argument that a law that compelled one man to contribute to the education of the children of another man was unconstitutional and void under both the fifth and fourteenth amendments to the Federal Constitution. And, as stated, substantially this same argument has been made in opposition to every effort on the part of the people to act collectively in carrying on any business enterprise, and this regardless of the conditions in which the people are placed. The same battle was fought when cities attempted to construct and operate street railway systems,

lighting systems and heating systems and when states and counties undertook to construct drainage systems or undertook to establish irrigation systems. In fact every effort made by a municipality or a state to carry on any business that had up to that time been carried on by private enterprise was opposed, and generally opposed by those who had profited by conditions as then existing. Fortunately, however, all these attempts to prevent progress have failed. After diligent search we have found no decision of the supreme court holding that any business enterprise carried on by a state in its sovereign capacity for the benefit of its people and owned and controlled by the state was being carried on in violation of any provision of the Constitution of the United States.

MAGNITUDE OF THE BUSINESS INVOLVED.

An argument against the validity of the legislation in question is sought to be founded upon the *magnitude* of the business contemplated. The court is reminded that under the legislation involved it is the purpose of the State of North Dakota by means of funds raised by taxation to engage in the mill business, the elevator business and banking business. As matter of fact the purpose of engaging in these various lines of business is to accomplish a single purpose, namely, improving the agricultural conditions in the state. Each of these various lines of business is related to the others and they are all essential to the carrying out of the general purpose of the legislation. The elevators are to be operated so as to prevent private interests securing a monopoly of the grain business, and thus being able to control the prices

and the conditions of its sale and transportation. The flour mill business is for the purpose of having the grain raised in the State of North Dakota manufactured into flour within the state and thus preserving within the state the by-products. The bank was created for the purpose of enabling the state to finance these various lines of business.

But manifestly it is the nature of the business and the purpose sought to be accomplished by it and its relation to the people and not its magnitude that determine whether it is public business or private business, and therefore whether it can lawfully be carried on by the state or by a municipality within the state.

THE CASE OF GREEN ET AL VS FRAZIER ET AL, 176 N. W.
DECIDED JANUARY 2, 1920.

In their brief frequent references of an complimentary nature are made by appellants' counsel to this case. The Attorney General's relations to that action are and have been exactly the same as his relations to the case at bar. The case at bar, as has been seen, was commenced in the United States District Court of the District of North Dakota. The questions of law were raised by answer and motion to dismiss. The suit was brought by taxpayers of the State of North Dakota. In form the case at bar is an ordinary taxpayers suit to enjoin public officials from paying out the public funds and from collecting taxes provided for by the legislation in question. The case of Green vs Frazier is of exactly the same nature.

The case of Green et al vs Frazier et al was instituted in the state court. The plaintiffs are resi-

dents and taxpayers of the state and the relief sought is substantially the same as that sought in the case at bar. Following the established procedure the Attorney General interposed a demurrer to the complaint. This demurrer was brought on for argument in the regular way and was argued by the Attorney General. The demurrer was sustained. The plaintiffs promptly appealed from the judgment of dismissal to the supreme court of the state. In view of the public importance of the litigation and on application of the plaintiffs the argument in the supreme court was advanced, exactly as the argument of the case at bar was advanced by the supreme court of the United States. On the argument in the supreme court of the state the defendants were represented by the Attorney General. Later and in due course the case was decided by the supreme court of the state.

Appellants' counsel attempt to cast suspicion upon this decision of the supreme court of North Dakota and to minimize its effect by insinuating that it was a "friendly case"—in other words that the case was not brought in good faith and that the supreme court was in some way culpable in not refusing to take jurisdiction and in not refusing to render a decision.

It may be that the plaintiffs in the case at bar had some preference right to represent the body of the taxpayers of the state in contesting the validity of the constitutional provisions and statutes involved in the litigation, but we confess we are at a loss to know where or how they acquired

any such right. We know of no reason why the plaintiffs in the case of *Green vs Frazier* did not have the same legal and moral right to institute and prosecute their action that the plaintiffs in the case at bar had to institute and prosecute their action.

Inasmuch as the Fourteenth Amendment to the Federal Constitution is involved and that, therefore, the supreme court is the court of last resort it was perhaps not important whether the litigation was initiated in the federal court or in the state court; but, as it seems to us, the orderly procedure would have been to initiate the litigation in the state court so that when the matter came before the supreme court that court would have the benefit of the decision of the court of last resort of the state by which the legislation in question was enacted and in which the laws called in question were to operate.

To us, at least, it would seem altogether fitting that before this court was asked to decide the questions as to whether the business contemplated by the legislation involved was public or private, and whether those laws were necessary in the public interest, and whether in their operation they would promote the general public welfare the judgment of the judges of the supreme court of North Dakota as to the conditions existing in the State of North Dakota should first have been obtained and presented to this court.

In *Jones vs Portland*, *supra*, (p. 255) this court said:

“While the ultimate authority to determine the validity of legislation under the 14th

Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect."

It is not our understanding that appellants' counsel intended to charge collusion between the Attorney General and the plaintiffs in *Green vs Frazier*. Their complaint seems to be that the supreme court of the state consented to hear and decide that case. We respectfully submit that the case came to the supreme court of North Dakota in the regular way; it was a case of great public importance and we cannot see that because other parties had instituted another action in the federal court was any good reason why the supreme court of North Dakota should have refused to hear and determine the case. Had the decision of the state court sustained the views of appellants' distinguished counsel we are, we think, safe in saying that no criticism of that court would have been found in counsel's brief.

Must we conclude, then, that it is because this court *will* give due weight to the decision of the supreme court of North Dakota upon the questions here involved that appellants' counsel pretend to see something suspicious in the circumstance that the supreme court of North Dakota heard and decided the case of *Green vs Frazier*?

For the reasons stated we contend that the decree should be affirmed.

Respectfully submitted

W. S. LAUDER

W. S. Lauder
Bismarek, North Dakota,
Attorney General of the State
of North Dakota,

W. S. LAUDER,

Wahpeton, North Dakota,

S. L. NUCHOLS,

Mandan, North Dakota,

Attorneys for Appellees.

Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 508.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, ET AL.,
Appellants,

vs.

LYNN J. FRAZIER, ET AL.,

Defendants.

Brief on Behalf of Defendants, Lynn Frazier, Governor; John H. Hagan, Commissioner of Agriculture and Labor; and The Industrial Commission of North Dakota.

WILLIAM LENKE,

Fargo, North Dakota,

FREDERIC A. PIKE,

St. Paul, Minnesota,

Attorneys for said Defendants.

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Supreme Court of the United States.

IN EQUITY, No. 508.

OCTOBER TERM, 1919.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, L. A. WOOD, NELS NICHOLS, GEORGE SIDELER, EMIL SCOW, W. C. MARTIN, HENRY MCLEAN, GEORGE P. HOMNES, B. W. HERSEY, T. W. BAKER, GEORGE CHRISTENSON, R. H. LEVITT, E. J. MCGRATH, E. A. ANDERSON, T. B. OAKLEY, O. F. BRYANT, GEORGE D. ELLIOTT, JOHN SATTERLUND, P. S. CHAFFEE, ALFRED THURING, J. S. GARNETT, J. E. BAKER, JOHN R. EARLY, B. C. JOHNSON, JOHN C. LEACH, FRED STECKNER, FRED L. ROQUETTE, IVER K. BAKKEN, MICHAEL TOAY, J. L. HARVEY, WILLIAM BURNETT, NATHAN UPHAM, ORLANDO BROWN, J. O. HANCHETT, W. W. WILDE, ARLO ANDREWS, DUNCAN BROWNLEE, W. W. COFFEL, E. B. ROSCOE, C. H. KINNEY, ON BEHALF OF THEMSELVES, AND ALL OTHER TAXPAYERS OF THE STATE OF NORTH DAKOTA,
Appellants,

vs.

LYNN J. FRAZIER, WILLIAM LANGER AND JOHN N. HAGAN, ACTING AND PRETENDING TO ACT AS THE INDUSTRIAL COMMISSION OF NORTH DAKOTA; LYNN J. FRAZIER, CARL KOZITSKY, WILLIAM LANGER, OBERT OLSON, AND THOMAS HALL, ACTING AS THE STATE AUDITING BOARD, LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY AND MINNIE J. NIELSON, CONSTITUTING AND ACTING AS THE BOARD OF UNIVERSITY AND SCHOOL LANDS; OBERT OLSON AS STATE TREASURER OF THE STATE OF NORTH DAKOTA; CARL KOZITSKY AS STATE AUDITOR OF THE STATE OF NORTH DAKOTA; AND LYNN J. FRAZIER, AS GOVERNOR OF SAID STATE; WILLIAM LANGER AS ATTY. GEN. OF SAID STATE, JOHN N. HAGAN, AS COMMISSIONER OF AGRICULTURE AND LABOR OF SAID STATE, THOMAS HALL AS SECRETARY OF STATE OF SAID STATE; AND MINNIE J. NIELSON AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF SAID STATE; AND LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, OBERT OLSON, JOHN N. HAGAN, AND MINNIE J. NIELSON, INDIVIDUALLY,
Defendants.

on Behalf of Defendants, Lynn Frazier, Governor; John A. Hagan, Commissioner of Agriculture and Labor; and The Industrial Commission of North Dakota.

Statement

The appellants ask the Federal Government to obstruct public policy of North Dakota.

The public policy of North Dakota thus attacked is declared its constitution as expressed in Section 185, Article 12 thereas amended by Article 18, (Transcript page 6, folios 8, Bill Complaint, Section XIII, last paragraph).

The appellants ask the Supreme Court of the United States to adjudge that the Constitution of the State as found in the constitution thereof cited is void in certain respects (Transcript, page 14, folio 19), and insofar as the provisions of that section relate to the facts pleaded.

The public policy of the State of North Dakota, as declared in said section of its Constitution, is followed and in part carried out by seven certain laws of the State which are recited in the bill of complaint. These laws provide for the establishment and maintenance, by the State, of certain public enterprises, and for bond issues incidental thereto; and these matters have come to be known as the industrial program of North Dakota.

The appellants ask that these laws and this program be adjudged void (Transcript, pages 14 to 17, folios 19 to 23).

The appellants ask that the Supreme Court of the United States restrain the defendants, who are officers of the State

of North Dakota, from carrying out its declared public policy and from performing duties with respect to the public enterprises and the industrial program of the State which the laws of the State require them to perform.

The defendants, Lynn J. Frazier, Governor, John N. Hagan, Commissioner of Agriculture and Labor, and the Industrial Commission of North Dakota moved in the District Court of the United States, in which this action was commenced, to dismiss the action because of insufficiency of facts stated in the complaint to constitute a valid cause of action, and because of lack of jurisdiction in the Federal Courts as shown by the facts alleged in the complaint (Transcript, pages 52-53, folio 73 $\frac{1}{2}$).

Other defendants joined in a similar motion. Decree of dismissal was thereafter granted (Transcript, page 83, folio 116); and the plaintiffs thereafter appealed.

At the hearing below counsel were heard at length as to the right of the plaintiffs to bring the action as well as regarding the questions claimed to arise under the Federal Constitution. The motion to dismiss involves the jurisdiction of the Federal Courts in this, that, unless it appears from the facts involved that right secured to the plaintiffs by the Federal Constitution are threatened with violation, they have no standing in the Federal Courts and can obtain no relief therein, for the reason that their cause does not arise under the Constitution of the United States. From the point of view of the public interests of the State of North Dakota, we conceive that this is the paramount issue upon this appeal. For that reason we do not here discuss the question of jurisdiction arising out of the possible lack of proper interest in the plaintiffs to bring their action in the Federal Courts. Accordingly we address ourselves at once to a discussion of the constitutional issues involved.

Argument

SECTION 1.

SCOPE OF THE ARGUMENT.

Have the people of a State the power to put in operation the North Dakota industrial program?

If the people of a State ever had that power, they have it now, unless it has been limited or ended by the only higher governmental authority, that of the Constitution of the United States.

We assert that the people of each State have had that power from the beginning of statehood, and that they have it now unimpaired.

This is the field of the discussion that follows.

SECTION 2.

ALL ORIGINAL POWERS OF GOVERNMENT ARE IN THE PEOPLE.

When the people of the thirteen colonies renounced the authority of Great Britain they took upon themselves all the powers of sovereignty and of government. Each state then became an independent political body, free from external control. Its people had all governmental powers.

The entire domain of the privileges and immunities of citizens of the states, sprung into being upon the Declaration of Independence, lay within the constitutional and legislative power of the people of the several states.

The Slaughterhouse Cases, 16 Wall. 36, 1872, p. 409.

"In the beginning the people held in their own hands all the power of an absolute government. Upon the separation of the British colonies from the British Empire the people of each colony, then become a state, had absolute control of life, liberty and property within their several territorial domains."

Sharpless v. Philadelphia, 21 Pa. 147, 1853.

Opinion by Justice Black, pp. 159, 160.

The people of the several states, acting in their sovereign capacity, could in their governmental acts exercise an absolute and unlimited discretion which could not be brought to the test of any restrictive rules.

People v. Salcm, 20 Michigan 452 (1870).

Opinion by Judge Cooley, p. 473.

The people of every state then had under their entire control every relation of their inhabitants. With those relations they could deal as they saw fit.

Constitutional History of the United States, Geo. T. Curtis, Vol. 2, p. 163.

In short, in the language of Judge Black in *Sharpless v. Philadelphia* (*supra*, p. 160), the power of the states was supreme and unlimited.

The investiture of supreme and absolute power in the people of the several states was a necessary consequence of the circumstances of the American Revolution. In the passing of sovereignty from Great Britain it could be lodged nowhere but in the people. That sovereignty should be so lodged was in accord with the philosophy of government and of human rights which was to find expression in the institutions of the new nation; and it was the practical actual result of the new condition of nationality.

The first Continental Congress declared in 1774, that "the English Colonists * * * are entitled to a free and exclusive power of legislation in their several provincial legislatures * * * in all cases of taxation and internal polity, subject only to the negative of their sovereign." ("Declaration and Resolves," First Continental Congress). When the negative of the sovereign passed away, the only negative that could supplant it was that of the people themselves.

An instructive view of the extent of sovereign power that became the possession of the American states is found in a review of judicial expressions regarding the extent of the power of the British Parliament.

In the English system the supreme power, the absolute and uncontrollable authority which in all states resides somewhere and from which there is no appeal, has always been held to be lodged in the Parliament.

Constitutional History of the United States, Curtis, Vol. 2, p. 107.

The powers of the English Parliament are transcendent and absolute. It cannot be confined with any bounds either for

causes or persons.

The Englishment Government, by Thos. F. Moran, p. 290
291, citing Sir Edward Coke.

Sharpless v. Philadelphia, 21 Pa. 147, 160.

When the intent of Parliament is expressed there is no court that has power to defeat it, when that intent is couched in such evident and express words as to leave no doubt of the legislative purpose.

Calder v. Bull, 3 Dall. 386.

Opinion by Justice Iredall, p. 84, citing 1 Bl. Com. 91.

Whatever has come in modern times to be the force which public opinion and the national will exert through the House of Commons, whatever are now the acknowledged rights of individuals, it still remains true that everything is held at the supreme pleasure of Parliament. The power of Parliament like that of all sovereign bodies is limited only by the willingness of the people to obey or their power to resist.

Constitutional History of United States, Vol. 2, p. 108.

The English Government, Moran, p. 290.

Although there have been in English history many statute charters and public acts which were regarded as fundamental and as embodying various rights of individuals, classes and the crown, all have been subject to the unrestrained power of Parliament.

Constitutional History of United States, Curtis, Vol. 2,
115.

"When the people of the United Colonies separated from Great Britain, they changed the form but not the substance of their government. They retained for the purposes of government all the powers of the British Parliament, and, in state constitutions or other forms of social

"compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently when it was found necessary to establish a national government for national purposes, a part of the powers of the states, and of the people of the states, was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people."

Munn v. Illinois, 94 U. S. 113.

at transcendent power of parliament devolved on the American people by the Revolution; and the people of each in the Union, after the Declaration of Independence and the adoption of the Federal Constitution, had absolute control of life, liberty and property within their territorial domain. As an eminent judge has expressed it, if the people of any state had "given all the authority which they themselves possessed, to a single person, that would have created despotism as absolute in its control over life, liberty and property as that of the Russian Autocrat."

Harpless v. Philadelphia, 21 Pa. 147, 160.

the theory that the universal and absolute power of Parliament was transferred to the American people was consistent with the philosophy of government upon which American nationality was founded, although the American and British theories of government were not the same. The view that we have

taken of parliamentary power shows that in the British system, as in almost all other governments of mediaeval and modern times, the idea prevailed that "the government itself is the source of all power and whatever of liberty it allows to its subjects is a concession." "The idea that the source of all power is the people, that the supreme authority is in them, and that the government grants nothing to them and that it derives all its power from them is not the principle of the British political system."

But in America it was "discovered that a government could be founded on the principle that the people themselves are the source of all power; that they can create such government as they may see fit to establish; that they may lay it under any restraint that they may deem necessary to impose upon it." This was the American system as expressed in all the great national documents of the formative period of American nationality; and it was a logical conclusion in law as in philosophy, that the powers of the British sovereignty as vested in the British Parliament became vested in the people of the British colonies when they ceased to be colonies and became independent states.

The practical working conditions of government led to the same result. With the passing out of that element in the British system known as the royal prerogative, from the American system, no part of its powers as expressed in either personal or public functions, devolved upon any person in America or upon any group of persons less in number than the entire people. Of practical necessity therefore this element of government as pre-existing in the British system was assumed by the people of America in their several state organizations,—a result not only in harmony with the new philosophy of government as expressed in American institutions but also in necessary consequence of it.

From this review of elementary principles and of primary conditions it is clear that if, immediately after the Declaration of Independence, any State of the American Union had by vote of the people adopted a program identical with the North Dakota program, that action would have been authoritative and final. Until the adoption of the Federal Constitution such action by the people of any State could not have been drawn in question. A program so adopted would have become the fundamental law of the State.

By way of illustration of the foregoing propositions it may be remarked that in respect to property, business and persons within the limitations of the respective states their power of taxation was entire and absolute. The extent to which the power of taxation should be exercised, the subjects upon which it should be exercised, and the mode in which it should be exercised, were all equally within the power of the people of the states and within the discretion of the legislatures to which the states committed the exercise of the power. Until the adoption of the federal constitution the will of the people as expressed in their state constitutions or through elections was without limitation. Before the federal constitution the states of the American Union were independent nations in all matters of revenue and taxation.

Lane v. Oregon, 7 Wall. 71.

Constitutional History of the U. S., Curtis, Vol. 2, p. 173.

The powers of the several states that have been for convenience grouped under the term "police powers" are a part of the sovereign power of the people and are a further illustration of that indefinite field of power which belongs to the people of the states in their sovereign capacity. Police powers so-called do not spring from any source outside the states. They do not

exist, for example, as the result of creation by national authority. Their validity is not recognized through the sufferance of the federal government. If there has been any tendency on the part of the federal courts to recognize a wide scope of police powers, that tendency is only a form of recognition on the part of the courts of the fundamental powers of the people of the states, and of the circumscribed operation of the limitations and inhibitions of the federal constitution and its amendments as applied to the functions and powers of the people.

SECTION 3.

POWERS DELEGATED BY THE PEOPLE TO THE GOVERNMENT OF THE
STATES AND TO THE GOVERNMENT OF THE UNITED STATES.

ARTICLE 1. *Powers delegated to State Governments.*

Proceeding to exercise the powers thus possessed the people of the several states of the Union erected within their jurisdiction such forms of government as they deemed proper and through the state government so organized they employed such of the powers that they possessed as they desired to exercise. On the state governments so constructed the people bestowed certain powers by enactment in appropriate language of authorization and limitation, and they defined and limited those powers in the written instruments that became known as the state constitutions. Thus began the operation of the state governments, possessing powers delegated by the people and functioning through officers and agents chosen by the people. In constituting their governments the people of the states retained nothing of their fundamental powers, nothing of their right of ultimate and absolute control over life, liberty and property, nor of their power to modify the governments so erected or to erect other governments in their place.

The form of constitution adopted by the several states is not to be taken as the measure of the power of the people with respect to their government. Before the adoption of the federal constitution the people of the several states could have adopted any form of government that they pleased. The people of a state might have established a monarchy, just as it was once suggested by some well known persons should be done with respect to the national government. The very limitations upon the power of the states inserted in the federal constitution, as for example, the guaranty of a republican form of

government to each state, show the complete absence of such limitations from the Declaration of Independence until 1787. As stated by Justice Iredall in *Calder v. Bull*, *supra*, if as a result of the popular decision a state "government composed of legislative, executive and judicial departments were established by a constitution which imposed no limitations on the legislative power, the consequence would inevitably be that whatever the legislative power chose to enact would be lawfully enacted."

If, then, a state of the Union prior to the adoption of the federal constitution had delegated power to its legislature to enact such laws as were enacted in North Dakota in 1919, and the legislature had proceeded so to do, it is clear that such laws would have been valid and incontestable.

TITLE 2. *Delegation of powers to the United States and States resulting from the Adoption of the Federal Constitution.*

Having exercised their powers in part in the erection of state governments, the people of the United States for the purposes expressed in the preamble of the Federal Constitution, proceeded to make a national government, and by the terms of the Federal Constitution delegated to it the exercise of certain governmental powers. Thereby the people placed upon themselves and upon their state governments certain limitations; but subject to those limitations the powers of the people within each state, and the powers of the state governments as erected by the people, continued unabated and unimpaired. In each of our references to the Federal Constitution throughout this brief we mean to include its amendments and the necessary implications of its terms as interpreted by this Court, at the time concerned in such reference.

Otherwise than as expressly limited by the federal constitution the power of the people of the state to enact laws for such state, either directly or through the agency of a legislative body continued the same as before the adoption of the federal constitution.

Pine Grove v. Talcott, 19 Wall. 666.

Sharpless v. Philadelphia, 21 Pa. 147, 163.

It continued to be the right of each state to regulate at its pleasure the general relations of persons within its territory to each other as well as all rights to property subject to its jurisdiction. The power of each state extended to everything within the sphere of its control.

Pine Grove v. Talcott, 19 Wall. 666.

American Law 1 Enc., Br. 828, by Simeon E. Baldwin.

The states continued to have the right to administer their own affairs in their own way through their own agencies.

United States v. B. & O. Ry. 17 Wall. 322 (1872).

Upon the adoption of the federal constitution the people of each state delegated a portion of their control over life, liberty and property to the United States. They specified what powers they gave, they withheld the rest. All the powers that were delegated by the people to the Federal Government are defined.

Calder v. Bull, 3 Dall. 386.

Sharpless v. Philadelphia, 21 Pa. 147.

That the people of the several states retained all the powers of government not yielded to the United States was assumed to be a fundamental implication resulting from the fact that the powers granted to the federal government were specific, described, limited and enumerated and did not comprehend all the powers of sovereignty.

Constitutional History of the United States, Curtis. Vol. 2, p. 163.

After the adoption of the federal constitution the people of each state in the Union had all control over life, liberty and property within their several territorial domains except the specified portion of that control which had been delegated to the United States.

Sharpless v. Philadelphia, 21 Pa. 147, 160.

The Ninth and Tenth Amendments are the familiar memorials of the demand of the people at the time of the adoption of the federal constitution for unmistakable written expression of the universal understanding of the relationship of the federal and state governments.

SECTION 4.

APPLICATION OF FOREGOING CONSIDERATIONS TO THE STATE OF
NORTH DAKOTA.

The respective powers of the states of the Union, and their relations to the other states in the Union and to the government are precisely the same in the case of states admitted to the Union subsequently to the formation of the national constitution as in the case of those states which existed at the beginning of American Independence.

McCulloch v. Maryland, 4 Wheaton, 410.

So the powers of the State of North Dakota are the same with relation to the powers of the national government as though the State had been in the Union when the federal government was established. If the power of each of the original states to adopt the North Dakota program,—a power which we have seen was complete at least until the adoption of the Federal Constitution—has not been limited by the Federal Constitution, then North Dakota now has that power complete and without limitation.

SECTION 5.

CERTAIN CONSIDERATIONS ELIMINATED AS GROUNDS FOR CLAIMS
OF INVALIDITY.

If the questions as to the validity of the North Dakota Constitution and laws do not arise under the Federal Constitution, then this cause is not within the scope of the judicial power of the United States. The appellants contend that their objections to the laws do raise questions arising under the Federal Constitution. We shall in order consider appellants' claim, but before doing so we shall try to simplify the course of our argument in that regard by pointing out certain considerations that will not be regarded as valid reasons for holding an act by a state to be prohibited by the national constitution.

At the outset it will be conceded that it does not belong to the courts to interpolate constitutional restrictions.

Pine Grove v. Talcott, 19 Wallace 666.

The language of Judge Black defining the province of the judiciary in construing a state constitution may aptly be paraphrased and applied to judicial consideration of the powers of the states. The federal constitution has enumerated the things which a state may not do. If the courts extend the list, they would alter the instrument, they themselves would become the aggressors and would violate both the letter and spirit of the organic law. If the courts can add to the reserved rights of the people (as against the reserved powers of the states) they can take those rights away; if the courts can mend, they can mar; if they can remove the landmarks which they find established, they can obliterate them; if they can change the constitution in any particular, there is nothing but their own

will to prevent them from demolishing it entirely.

Sharpless v. Philadelphia, 21 Pa. 147, 161.

Laws will not be adjudged invalid for reasons based on general principles of public policy or legislative propriety.

United States v. B. & O. Ry. Co., 17 Wall. 322.

Sharpless v. Philadelphia, *supra*.

Munn v. Illinois, *supra*.

Laws are not to be set aside and held invalid merely because in the opinion of the courts they are disregarding of right and justice; or are impolitic or inexpedient; or are unwise or oppressive; or violative of the spirit of our institutions; or because they are unnecessary.

Pine Grove v. Talcott, 19 Wall. 666.

United States v. B. & O. Ry. Company, 17 Wall. 322.

McCullough v. Maryland, 4 Wheaton, p.

Calder v. Bull, 3 Dall. 386, p. 394.

Sharpless v. Philadelphia, 21 Pa. 147, 162.

Laws will not be adjudged invalid to relieve against excessive taxation.

McCulloch v. Maryland, 4 Wheaton, p.

United States v. Gettysburg Elec., 160 U. S. 680.

Sharpless v. Philadelphia, 21 Pa. 147.

The possibility of the abuse of power does not justify judicial limitation of power.

Again we may paraphrase the language of Judge Black and apply to the power of the states in their relation to federal control the principle applied by that learned jurist to the relation of legislative power to judicial review and control. The great powers reserved to the states are liable to be abused. This is inseparable from the nature of human institutions. No politi-

cal system can be made so perfect that it will always hold the true course. But there is no reason to suppose that the mere abuse or indiscreet use of the power reserved by the states was meant to be subjected to correction by the federal judiciary nor by any branch of the federal government. In delegating certain powers to the federal government that had originally been possessed by the states it was not intended by the people that as to powers reserved the federal judiciary should exercise a general supervision and control to the end of correcting possible abuses of those reserved powers.

Sharpless v. Philadelphia, 21 Pa. 147, 161.

All power may be abused where no safe-guards are provided. The remedy in such cases lies with the people and not with the judiciary.

Pine Grove v. Talcott, 19 Wall. 666.

That a power may be abused is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls not to the courts.

Munn v. Illinois, 94 U. S. 113, p. 134.

But on the contrary an act will be declared void only when it violates the constitution clearly, palpably and plainly.

Calder v. Bull, 3 Dall. 386.

Sharpless v. Philadelphia, 21 Pa. 147, p. 164.

But when a question arises as to whether a state in any of its functions,—whether by direct popular action as in the adoption of a constitution, or by delegated authority, as in the case of legislative, executive or judicial proceeding,—has attempted to act in a manner now prohibited by the federal constitution, then an issue arises which must be determined by the courts, with ultimate responsibility under the federal constitution upon the federal courts. It is immaterial from the federal view point as to the validity of an act drawn in question—whether

it is the act of the whole body of the people of a state or of delegated agents of the people. The material and sole question, in determining such an issue, is, has an attempt been made to exercise in behalf of a state of the Union an authority now forbidden to the states under the limitations and inhibitions of the federal constitution?—or is the act in question within the scope of those unimpaired powers of the several states which, existing from the beginning, continue unaffected by that delegation of certain powers which was made by the states to the general government? The answers to these alternative questions will be identical in effect, for an act of a state is within the original powers that we have stated unless it is found to be restrained by the Federal Constitution. The question, therefore, for federal courts in each instance is to be determined by the Constitution, as by them interpreted, and by nothing else; and unless the issue presented arises under the Constitution, the federal courts have no jurisdiction to determine it, no matter what other considerations are involved.

SECTION 6.

SUMMARY OF APPELLANTS' CLAIMS.

We are now ready to inquire as to the grounds upon which appellants found their contention that North Dakota has attempted to exercise powers of statehood prohibited by the Federal Constitution.

These grounds are stated substantially on pages 58 to 62 of their brief. They are presented in the form of "three claims under the Federal Constitution."

The three claims of appellants may be summarized as follows:

First: The North Dakota program, and the taxation incident thereto, violates fundamental rights of the plaintiffs, as citizens of a free government.

Second: The North Dakota program, established by the State Constitution, as amended, and the seven laws in question, violates the guaranty of a republican form of government.

Third: The North Dakota Constitution, as amended, and the laws in question are repugnant to the Fourteenth Amendment to the Federal Constitution.

SECTION 7.

APPELLANTS' FIRST CLAIM.

TITLE 1. *Statement.*

The first claim, which we are not surprised to observe seems to be somewhat doubtfully submitted, is that the North Dakota laws "violate the fundamental rights of the plaintiffs as citizens of a free government" (Appellants' Brief, page 58). This is the first of the three claims "under the Federal Constitution."

TITLE 2. *The Topeka Case.*

Counsel cite the *Topeka Case* (20 Wallace 665), and it may be that they have been misled by language employed in the opinion in that case;—language which, we think, was perhaps not necessary to the decision of that cause, and was inadvertently used by the learned judge who wrote the opinion, but which in any event can not be accepted as the deliberate and ultimate expression of the doctrine of the American constitutional system.

The language quoted begins with this statement: "It must be conceded that there are such rights in every free government beyond the control of the state." That there are rights in every free government beyond the control of the state, that is of the government, is a statement of fact which as such is not true. It should be conceded, it may without fear of contradiction be asserted, that there are rights of individuals which no free government should disregard or curtail, but which on the contrary every free government should protect and maintain; but it is a mere denial of fact to say that any such right of its citizens is beyond the control of the state. On the contrary the control of

the state must be invoked and exercised for the effectual maintenance and protection of such rights.

Historic instances are not lacking to illustrate the completeness of the control of governments, both free and autocratic, over individual rights of all kinds, many of which in our American system we consider as fundamental and not appropriate to the exercise of governmental interference, as we show elsewhere. The parliament of Great Britain has full and complete and absolute control of the rights of individual citizens within the British domain. In every government there resides absolute ultimate control of all such rights and it is because of this fact that it is infinitely important how and by whom in the government such control is exercised.

The learned judge suggests the hypothesis, "if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others," as though the condition were avoidable and optional; but it is not. No man liveth by or for himself alone. The avoidance of the condition stated in the passage just quoted is impossible. Every man does hold all that he is accustomed to call his own because society organized in government makes such holding possible. All in which the citizen places his happiness is secure, if it be secure, because it is secured by the state. Individual property, individual happiness, individual security rest upon the state; and because these things rest upon the state they are inevitably and perpetually under the dominion of the state. Autocratic, tyrannical, oppressive government, under whatever name, may exercise that control to the disparagement, diminishing and destruction of individual property, individual happiness and individual security. The very problem of enlightened government as conceived in the American system since its inception is so to control individual property,

business and security that they shall be promoted by promoting the greatest good of the greatest number. How to solve that problem has been the study of American statesmen and patriots. From the beginning up to now the solution has been attempted and carried on through the inspiration of an abiding faith in democracy. To nothing less than the whole body of the people has been confided the great work of government. Upon the whole body of the people has devolved every duty and obligation that rest upon a state, in the full confidence thus justified by experience, that not only does correct theory and righteous doctrine point to democracy as the true judge in human affairs, but also that the wisdom of experience points to the same conclusion.

Since it is inevitable that in organized society there must somewhere be a supreme authority invested with all the power of government,—power exercised either directly or by delegation of authority in such manner as shall be determined by the will of the sovereign,—the question has long been debated as to where or in whom that supreme authority should be lodged. Justice Miller expressed a doubt, if we follow his language to its necessary conclusion, whether it were not better to lodge the power of "unlimited dominion" in one man than in many. But that is not the theory, nor the practice of either the American or the English system. In Russia "unlimited dominion" was formerly possessed by one man, although his acts of individual authority gradually diminished in significance up to the end of the career of autocracy. In England "unlimited dominion" resides in parliament, but the influence of custom and of public opinion is an effectual and sufficient restraint. In the United States "unlimited dominion" can be found nowhere but in the people; but in them it is found—the power to make and unmake constitutions and laws, to create

and terminate institutions, to formulate and abandon policies and enterprises, to select and change agencies of administration, without let or hindrance; excepting only that the people of each state, when acting collectively in their capacity of statehood, are limited by the operation of the terms of that instrument of higher sovereignty, the federal constitution, by which they are forever bound together with the people of the other states in the American Union.

Justice Miller remarks that "the theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere." In the sense presumably intended this is of course true. "The executive, the legislative and the judicial branches of these governments are all (possessed of) limited and defined powers." That is to say, to no branch of their governments, either national or state, have the American people, out of their own unlimited dominion, delegate unlimited power; so that no president or governor, no congress or legislature, no court either federal or state, is justified in assuming any authority or in exercising any power, that is not found to be delegated by the people in the terms of federal or state constitution.

But in erecting governments, in establishing constitutions, in delegating certain limited powers to officers of their choice, the people have not shorn themselves of any of their own ultimate powers. Officers and constitutions and governments that they have made the people can unmake. Contemplating the exercise of the power to unmake, the people have provided a method for it. In the orderly American way officers can be changed, constitutions and governments can be amended. New officers may be chosen, or the old continued. Old constitutions may remain, or new constitutions be established. This admirable system, founded upon faith in government by the people, deposits unlimited powers in no delegated authority, but leaves the people always supreme.

We think that our meaning will now be understood when we undertake to qualify the language of Justice Miller in the *Topeka Case* contained in his statement that "there are limitations on such power which grow out of the essential nature of all free governments." If this language is understood to be restricted to such power as has been deposited by the people with any department or agency of their government, then it is accepted as true; but if it is understood as a statement of limitation of the power of the people, it must be rejected, for the reasons that we have endeavored to make appear above. It is indeed true that there are "reservations of individual rights" which should be respected by all governments, the failure to respect some or all of which has from time to time led to the destruction of one form of government and another. Some of these individual rights have in the American system been protected by express designation, written by the people in the fundamental law of state and nation. These individual rights it is the duty of the courts to protect against attempted invasion by legislatures and by congress. It is the glory of the American system and it is among the fairest laurels of the courts of our country, that such rights have been upheld at the bar and by the bench. But there are other individual rights among those which governments should respect which the American people have not so guarded, but which are left to be protected, regulated or controlled by the legislative representatives of the people. As to all rights, both as to those written into the constitution and as to those left to the discretion and judgment of the legislature, it remains true that they are still subject to the control and dominion of the people, in any case in which the people shall see fit to act. Neither executive, nor legislative, nor judicial department of the government can assume either the power or the right to dominate, control or defeat the people's judgment and will. Such an

assumption, if made by the courts, would involve the hypothesis of wisdom and good faith, of moral understanding and righteousness, of worthy purpose and just appreciation of the common welfare, superior in the courts to that found in the people who have made the courts. Such an hypothesis is fundamentally at variance with the genius of American institutions.

We do not at this time undertake a distinction, easily to be made, in the facts as stated in the *Topeka Case* and in the facts appearing in the case at bar. We now content ourselves with the discussion that has been submitted as to the language quoted from Justice Miller's opinion in appellants' brief. It is upon the theory of constitutional government propounded in the language quoted that appellants seem to rely; and therefore it has seemed fitting thus far to consider that language and that propounded theory rather than the facts involved. As a statement of what we conceive to be the true view of the American constitutional system, we submit with confidence the following language found in the dissenting opinion of Justice Clifford, which it appears to us is, as a general statement of the principles of our government, unassailable; and it is pertinent to the issues involved in the instant case:

"Courts cannot nullify an act of the state legislature
 "on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of
 "the instrument disclose any such restriction. Such a
 "power is denied to the courts, because to concede it would
 "be to make the courts sovereign over both the constitution and the people, and convert the government into a
 "judicial despotism." (*supra*, page 669).

Unless, therefore, appellants are able to point out some specific right protected by the federal constitution, which it would

appear under the *Topcka Case* has been threatened with impairment, we submit that the *Topeka Case* cannot avail as authority to support the first proposition or claim presented by the appellants' brief, on page 58.

TITLE 3. *Other Cases.*

By way of further support for their first proposition the appellants cite eight other cases as following the *Topeka Case*, none of them referring to the Fourteenth Amendment" (Appellants' brief pages 59, 60).

We will undertake consideration of these cases briefly in chronological order.

The earliest of these eight cases, then, is that of *Burlington v. Beasley*, 94 U. S. 310, (1876). This decision makes no weight for the appellants. It holds a certain bond issue to be valid, citing the *Topeka Case*, which had reached a negative result, to distinguish that case from *Burlington v. Beasley*.

The next case was *Osborne v. Adams*, 106 U. S. 181 (1882). The opinion in this case involved no consideration of any federal question, nor of any question of abstract justice or general principles such as were discussed in the *Topeka Case*. The opinion which closely followed the facts involved was based solely upon a construction of the Nebraska statute under the Nebraska constitution as aided by the decisions of the courts of Nebraska. The report of the case does not disclose how the cause found jurisdiction in the federal court. It may have been through diverse citizenship; but in any event the decision throws no light upon any issue involved in this cause.

The next of these eight cases, in chronological order, is that of *Parkersburg v. Brown*, 106 U. S. 487 (1882). This case also was decided upon construction of a state law and a state constitution, those of West Virginia (page 501). It is somewhat

loosely stated in the opinion that the bonds considered are void "within the principles" of the *Topeka Case*. But an examination of the whole opinion fails to disclose that the line of reasoning or the principles announced in the *Topeka Case*, had anything to do with the conclusion reached in the *Parkersburg Case*. It has no weight in support of the contention of the appellants herein.

Appellants' next citation in point of time brings us to *Osborne v. Adams*, 109 U. S. 1 (1883), which is merely a denial of rehearing of the case in 106 U. S. 181, and the comments made above as to that case are applicable to this.

Blair v. Cuming County, 111 U. S. 363 (1883) is another case resting upon the construction of a state law and a state constitution, those of the state of Nebraska; and as in the *Burlington case*, *supra*, a bond issue was held valid. We cannot find that the *Topeka Case* is even mentioned, to say nothing of its being followed.

The case of *Cole v. LaGrange*, 113 U. S. (1884), is still another instance of construing a state constitution—that of Missouri,—and holding that an act of the Missouri legislature was void thereunder. No federal question was raised or is involved. The opinion cites specific provisions of the Missouri constitution and construes them as rendering invalid the legislative attempt to authorize certain bonds, to be issued by the city of La Grange. The reasons for the construction stated do not concern the issues in the present case. It is true that in the opening paragraph of the opinion Mr. Justice Gray uses language of wider scope and meaning, but the propositions therein announced are not necessary to the decision reached by the court. Moreover, the propositions announced in that paragraph relate wholly to legislative power as derived from "general grant of legislative power in the constitution of a state." The language does not relate to, nor purport to limit,

legislative power granted specifically by the people of a state for a particular purpose. The closing statement of the paragraph mentioned,—“these limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject,”—either was intended to be understood in the sense just expressed, or else it is incapable of justification by the history of adjudicated cases up to that time. Consideration of the line of cases cited by appellants which we have just run over, shows that as an abstract proposition the decided cases had established no such limitations at the time this case of *Cole v. La Grange* was determined. The importance of the point justifies repetition of the assertion that in this case of *Cole v. La Grange* no federal question was involved and no question of abstract principles; and that if any of the language of the opinion seems to involve such questions, such language is not to be regarded as the authoritative and deliberate judgment of this court. In fact the particular consideration given in the opinion to specific provisions of the Missouri constitution seems to intimate, if it does not plainly suggest, that the legislation held invalid under those provisions, might have been held valid if appropriate provisions had been found in the Missouri constitution, placed there by the people appropriate to the effectuation of such laws. As an authority *Cole v. La Grange* has no other significance than is expressed in the two paragraphs which constitute the syllabus at the head of the reported case.

TITLE 4. *Dodge v. Mission Township.*

In addition to the six cases just considered appellants also cite on page 60 of their brief, two cases from courts other than the Supreme Court of the United States. One of these, *Dodge v. Mission Township*, 107 Fed. 827, on account of the distin-

guished ability of the judge writing the opinion, is entitled to much consideration. But even that learned judge has been led into formulating doctrines respecting the powers of the courts which we submit are not warranted either by weight of authority, or by full consideration of the American system. For if anything is clear in our constitutional system it seems to us that it is this: That the jurisdiction of the federal courts does not "lie deeper" than the federal constitution. The federal courts have no authority other than that which is granted to them by the constitution, and they are limited in their jurisdiction and in their powers to the scope within which the constitution operates. If this were not true it might happen that the federal constitution should in due course be so amended as, for example, explicitly to authorize and validate the statute held invalid in the *Dodge case*; and yet the federal courts, having, according to the *Dodge case*, a jurisdiction deeper than the constitution, could still disregard the peoples mandate and declare that law invalid and not enforceable, which the people through the states had declared enforceable and valid. Such a conclusion is manifestly absurd; but the only alternative conclusion is that the federal courts must be controlled by the federal constitution and can exercise only such powers and jurisdiction as they derive from it. It is the constitution that is the supreme law of the land, not the judgment of the courts. It is a mere commonplace to say that it is the function of the courts to interpret the constitution; and it is hard to understand how any judge should even inadvertently declare that the courts may pass beyond that function and declare that to be the supreme law of the land, which is not found in the terms of the constitution of the United States. A legislative act may be "an arbitrary decree," if one wishes to call it such; but it is nevertheless a law unless it is repugnant to the Constitution, and whether such an act is beyond the limits of the powers

anted by the people to the enacting legislature, is to be determined by the constitution,—the constitution as interpreted by the courts, but by the constitution and nothing else; not by any “general law” or any “underlying principle” or any concept whatever of governmental duty or obligation other than is found in the constitution.

In this last mentioned case of *Dodge v. Mission Township*, certain authorities are cited. Of these some have already been considered but there is one other to which we may now properly call attention although it is not included in the list of cases cited by appellants in their brief. This is the case of *Calder v. Bull*, 3 Dallas. 386.

The opinion in *Dodge v. Mission Township* cites a passage from the opinion in *Calder v. Bull*, in which it was remarked by Mr. Justice Chase that as to certain supposititious legislation it would be of such unreasonable character that there could be no presumption that the people of the state intended to entrust the legislature with the power of making such enactments. This dictum had nothing whatever to do with the decision reached in *Calder v. Bull*, as is apparent from the circumstance that the Connecticut law drawn in question was upheld by the United States Supreme Court. Yet this dictum of Justice Chase’s and others similar found in his opinion have frequently been quoted by the Courts of this country as authoritative precedent and as supporting the contention that it was proper for the Courts to deny legislative power to the states to enact laws which the Courts might deem against natural justice. The whole case of *Calder v. Bull* is not entitled to be considered an authority for any such doctrine. Justice Chase was one of three judges of the Court who filed opinions in that case and no more expressed the judgment of the Court as to the point in question than either of the other two; and no opinion of the three can be regarded as having weight as an authority except

as it announced views upon which the decision of the whole Court was based.

Against the propositions referred to in Justice Chase's opinion we may place the views of Justice Iredell, another judge who wrote an opinion in the same case. He said:

"If the legislature of the Union, or the legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, *the Court cannot pronounce it to be void merely because it is in their judgment contrary to the principles of natural justice.* The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say in such an event would be that the legislature (possessed of an equal right of opinion) had passed an act, which in the opinion of the judges, was inconsistent with the abstract principles of natural justice."

SECTION 8.

APPELLANTS' SECOND CLAIM.

As to the second of the three claims propounded by appellants (Appellants Brief, page 60), that the seven legislative acts in question are violative of the guaranty of a republican form of government expressed in Section 4, Article 4 of the United States Constitution, we need submit but short comment here. Unless we wholly misconceive both the principles of our constitutional government and the exposition of those principles contained in adjudicated cases, there is scarcely room for argument under this head. The subject is fundamentally and exhaustively treated in cases decided in this court.

Luther v. Borden, 7 Howard 1.

Pacific States Telephone Co. v. Oregon, 223 U. S. 118.

Kiernan v. Portland, 223 U. S. 151.

Ohio v. Hildebrandt, 241 U. S. 565.

It seems to be too well settled for discussion that the claim raised in this regard by the appellants is not a justiciable question. It would be presumptuous to undertake restatement of the reasons supporting this conclusion. As to the qualification of the authority of the *Oregon Case* suggested on page 61 of Appellants' Brief, it need only be remarked that in our understanding of the language quoted from the opinion of the Chief Justice, there is no intimation that an infringement of individual constitutional rights, if claimed, might be prevented under the guaranty of republican government to the states of the Union. The whole doctrine of the case points to a contrary conclusion. Our understanding of the language of the opinion is that if the defendant company in the *Oregon Case* had felt itself aggrieved in respect to violation of any of its con-

stitutional rights, it might have been heard in a justiciable controversy arising under provisions of the federal constitution appropriate thereto, but not under the provision found in Article 4, Section 4; and that is the situation of the appellants in this cause.

SECTION 9.

APPELLANTS' THIRD CLAIM.

TITLE 1. *Scope of the Issues Involved under this Claim.*

Coming now to the third contention or claim of appellants, stated by them to be their chief contention (Appellants' Brief page 61), namely, that the constitutional amendments and legislative acts in question are void under the Fourteenth Amendment to the Federal Constitution, let it be noted, if the court please, that the contention specifically includes the constitutional amendments of North Dakota recited in the bill of complaint; that is to say, the North Dakota constitution as it now stands in respect to the provisions touching which the appellants complain.

The seven laws in question are authorized by the North Dakota constitution as it now stands. The state courts have specifically so held; there can be in reason no contrary contention; and the appellants make no other claim—indeed the appellants, as they must necessarily do, concede the identity in substance of the constitution and these laws of North Dakota by asserting their equal vulnerability, in respect to their repugnancy to the Federal Constitution.

It is important to keep this feature of the pending controversy in mind, because thereby it is understood that herein the dispute is not as to the function of a representative, legislative body exercising or assuming, or pretending to exercise, delegated authority. The question here is not a construction of the powers of a branch of a state government, as defined by expression, or implication, or limitation, in the terms of a state constitution. The question is whether the people of a state have a right to adopt just these provisions that are found

in the North Dakota constitution. It is the validity of the act of the people themselves that is drawn in question. No adjudicated case is persuasive that does not reach to this extent. No principle is available in support of the complaint that does not take into consideration fundamental acts of the people. No provision of the Federal Constitution supports the contention of the appellants, unless it is so to be interpreted that it exercises its forbidding power upon the people themselves in their capacity as a state.

TITLE 2. *The Contention Centers upon the Terms of the Fourteenth Amendment.*

We assume that it has been satisfactorily shown that if there is anywhere an effectual limitation upon the people of a state prohibiting the enactment of such a fundamental law as the appellants attack in the North Dakota constitution, such limitation can exist only in some provision of the Constitution of the United States,—some provision of that instrument which palpably and clearly, by expression or necessary implication, prohibits and restrains the people of every state from the act in question.

It has been shown also that the people of the states from the time of the Declaration of Independence to the time of the adoption of the Federal Constitution, at least, in the exercise of the sovereign powers possessed by the people as a part of the ultimate sovereignty lodged in them upon separation from Great Britain, did possess the capacity and power to enact and enforce such provisions of law as are contained in the Constitution of North Dakota and as are expressed more in detail in the seven laws founded upon those provisions, all of which are here assailed. It appears moreover that by virtue of the adoption of the Federal Constitution by the states of the

ion, although that instrument did contain certain limitations on the pre-existing powers of the states, yet those limitations, whether express or implied, did not include any prohibition or other form of restraint laid upon the states or the people of the states which would have prevented or would now prevent the adoption or enforcement by the people of any state of such provisions as these in the Constitution of North Dakota are drawn in question. This does not need to be argued in this cause for it is admitted in the position taken by appellants. Leaving out of consideration the hesitant reference by appellants' counsel to the guaranty of a republican form of government, we find that they pass over all provisions of the national constitution and its amendments up to the time of the adoption of the Fourteenth Amendment and they discover in none of those original provisions of the fundamental law no provision, no limitation, no restraint which can be urged as a support for their contention. But they point to the Fourteenth Amendment and seek under its provisions the judgment of this court that the people of the state of North Dakota have exceeded their powers.

"Down to 1868, when this amendment was adopted, it was, as to most matters, for the state alone to settle the civil rights and immunities of those subject to its jurisdiction. If they were to be free from arbitrary arrests, secure in liberty and property, equal in privilege and entitled to an impartial administration, it was because the constitution of the state so declared."

"American Law" 1 Enc. Br. 828; Article by Prof. Simeon E. Baldwin.

TITLE 3. *General Relation of the Fourteenth Amendment to this Cause.*

The effect of the Fourteenth Amendment was indeed to restrain the states in the exercise of certain powers that they previously had. As expressed in *Minneapolis v. Beckwith*, 129 U. S. 26 (1888), "the Fourteenth Amendment prohibits discriminating legislation in favor of particular persons as against others in like condition." Is its scope wide enough to apply to the subject matter of this cause? Construing the amendment not only by its naked language but by the pre-existing body of the constitution and the changes intended to be made therein, the powers of states that up to the time of its adoption had existed unimpaired, the historic conditions that had induced congress and the states to conclude that some further limitation was expedient, and the results sought to be accomplished by the amendment,—in view of all these conditions, we inquire whether the prevention of such fundamental acts as these of the people of the state of North Dakota was within the intent of congress and the states when they adopted the Fourteenth Amendment, and whether its language, so construed, can be held a prohibition of such enactment by the people of the states. "In any fair and just construction of any section or phrase of this Amendment, it is necessary to look to the purpose which was its pervading spirit, the evil which it was design to remedy" (*Slaughter House Cases*, 16 Wallace, 36, 72).

It is appropriate to quote further from the opinion in the case just cited. In view of the character of the claims made by appellants and of the results that would follow a judgment in this cause in conformity with their contention, this language of Mr. Justice Miller is apt for our consideration :

"When these consequences are so serious, so far reach-

"ing and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to "fetter and degrade the state governments by subjecting "them to the control of congress (in this instance of the "courts), in the exercise of powers heretofore universally "conceded to them; when in fact it radically changes the "whole theory of the relations of the state and Federal "Governments to each other and of both these Governments to the people; the argument (drawn from the consequences urged against the adoption of a particular construction of an instrument) has a force that is irresistible, in the absence of language which expresses such a "purpose too clearly to admit of doubt" (Opinion of the "Court, page 78).

In the light of this declaration of this Court and of the reasoning that led up to it in the preceding portions of the opinion in the *Slaughter House Cases*, we turn to consider whether it was the purpose of the Fourteenth Amendment to abridge the power of the state of North Dakota to put into effect the will and purpose of its people as expressed in the amendments adopted in 1918.

TITLE 4. *Propositions involved in Appellants' Line of Reasoning under the Fourteenth Amendment.*

Appellants' argument as to the effect of the Fourteenth Amendment is based upon elusive grounds, and their conclusions are reached somewhat in the form of mere assertion. We undertake to restate their position under the Fourteenth Amendment as gathered from their brief on pages 61 and 62 and pages 85 to 114, as follows:

1. It is the settled law of the United States that the right of taxation can only be used in aid of a public object.

2. Therefore, taxation for a private purpose constitutes taking property without due process of law.

3. A public object is an object within the purposes for which governments are established.

4. The state enterprises are not objects within the purposes for which governments are established.

5. The state enterprises are a private business, or to put it otherwise, the purpose of the state enterprises is a private purpose.

6. Therefore, taxes cannot be levied under the settled law of the United States in aid of the state enterprises, because taxation in aid of the state enterprises is a taking of property without due process of law and is repugnant to the Constitution of the United States.

It will be noted that the first three propositions stated above are in effect quoted from page 62 of appellants' brief, except that we have substituted in the first proposition the words "the United States" for the words "this country," used by appellants' counsel. The distinction is obvious and must be made. We are discussing here and must be governed by the law of the United States in its application to the laws of North Dakota. The phrase used by appellants' counsel is broad enough to include the law of each one of the states of the Union as interpreted or determined by their local courts. With that body of state law we have no concern, although of course in reaching conclusions upon principle we may be aided by the reasoning employed by learned judges of state courts.

TITLE 5. *Erroneous Assumption as to the State of the Law regarding Taxation contained in Propositions 1 and 2 recited under the last Title.*

But is it true, as placidly assumed by counsel, that it is the settled law of the United States, that the right of taxation can only be used in aid of a public object?

What is the "settled law" of the United States? For the purposes of this cause and of testing the validity of counsel's argument, we are interested in defining the settled law of the United States only in so far as that settled law has to do with the powers of the United States government and with the jurisdiction of the United States courts to prevent the operation of powers claimed by the government of a State. That whole body of settled law is to be found, and found only, in the Constitution of the United States. In that sense it is certainly true, as stated by Baldwin in his article on American Law in the *Britannica*, that "the United States as a whole has no common law" (1 Enc. Brit. 828).

Unless it can be shown that under the Constitution "the right of taxation can be used only in aid of a public object," it cannot be asserted truly that that is the settled law of the United States. The first proposition, therefore, of appellants' counsel as stated above is a *petitio principii*, it begs the question; for the appellants must show and cannot simply assume that the Constitution of the United States thus limits the powers of the several states. Appellants have cited neither any language of the Constitution which expresses such a limitation nor any decision of this court which so interprets any provision of it.

The Topeka Case, the Dodge Case and the La Grange case, cited on pages 62 and 88 of the appellants' brief, we have discussed elsewhere.

Fallbrook District v. Bradley, 164 U. S. 112, is cited on page 88 of appellants' brief. We have not considered this case elsewhere and therefore now quote from the opinion therein by Mr. Justice Peckham the following:

"If the act violate any provision, expressed or properly implied, of the Federal Constitution, it is our duty to declare it; but if it does not, there is no justification for the Federal Courts to run counter to the decisions of the highest State Court upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with some principles of general constitutional law."

The Court proceeds thereupon to inquire whether the act therein drawn in question, *as construed by the State Court*, violates the federal constitution (page 156); and thereupon remarks "*there is no specific prohibition in the Federal Constitution which acts upon the states in regard to their taking private property for any but a public use*" (page 158).

It is further remarked on the same page of the opinion that "it is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this Court, even where the taking is under the authority of the state instead of the Federal government." But in this case it was not decided that the claim as stated in the opinion just quoted is a valid claim; for upon the facts thereafter considered, it is held that the use in aid of which the tax was to be levied was a public use and therefore in any view of the Constitutions involved must be sustained.

This case, therefore, does not aid the contention of the appellants.

The recent case of *Jones v. Portland*, 245 U. S. 217, is grouped with the *Topeka Case*, 20 Wallace 655, in support of the statement that it has been by this court "established beyond cavil, that there can be no lawful tax which is not laid for a public purpose" (Appellants' Brief, page 88). The words here quoted are from the opinion in the *Topeka Case* (page 664), and the *Portland Case* is cited doubtless because it cites the *Topeka Case* with approval. With all deference to the distinguished jurist who wrote the opinion in the *Topeka Case*, we submit that we have shown reasons elsewhere in this brief for doubting the conclusion as to the interpretation of the federal constitution which seems to be stated in the language just quoted. The language of the opinion in the *Portland Case*, does not go to the length of supporting the proposition quoted from the *Topeka Case*, but moderately assumes, upon the authority of that case, that the general doctrine therein stated is "well settled," namely, "that exertion of the taxing power for merely private purposes is beyond the authority of the state" (*Jones v. Portland*, 245 U. S. at page 221). Now the *Portland Case* in its conclusion fully supports, as we understand it, the validity of the laws here assailed. The passage last quoted, which is the passage relied upon by appellants in their citation of the case at page 88 of their brief, was not of course a part of the reasoning by which the conclusion and decision of the Court in that case was reached; and it is therefore not within the scope of the authority of that case as a precedent. The language indicated is, as we understand it, merely a concessive statement, assuming, without supporting, the correctness of the dicta in the *Topeka Case*, but rendering judgment favorable to the law attacked notwithstanding such concession.

While referring to the appellants' citation of the *Portland Case*, we note here that, on page 109 of their brief, they have done violence to the reference made by this Court in that case to the case of *Laughlin v. Portland*, 111 Maine 488. The quotations reproduced on page 109 of appellants' brief, are there stated to have the approval of this court as though this court intended to be understood as adopting the language of the excerpts so reproduced. It seems to us clear that no such thought was in the mind of this Court as expressed in the opinion in *Jones v. Portland*. If we correctly understand the intention of the Court, the opinion in the *Laughlin case* was quoted to show the view held by the Maine court as to the facts as well as the law, and not for the purpose of defining limitations upon the powers of the states as assumed by appellants.

We submit, therefore, that appellants have wholly failed to show that it is the settled law of the United States that the right of taxation can only be used in aid of a public object. We have shown that such settled law, if it exist, must be found in the constitution; and we have shown further, both that there is an entire absence of such provision expressed in the Constitution, and that there is no implication of any such limitation in the Constitution as interpreted by the decisions of this Court. If we are right in this position, and it seems to us that the position is incontrovertible, then the reasoning of the appellants in this case falls to the ground. For if their first proposition is not true, then their second proposition falls with it. The second proposition that taxation for a private purpose constitutes taking property without due process of law is assumed by the appellants to follow as a conclusion upon the first proposition because if the first proposition be accepted as true, then due process of law is not observed by the exercise of the power of taxation for a private purpose. Obviously then, if the first proposition falls, the second goes with it.

TITLE 6. *The Third Proposition, recited under Title 4 above, as to what Constitutes a Public Object and a Public Purpose; and therewith the Fourth and Fifth Propositions, as to the Character of the North Dakota enterprises.*

We now take up the third proposition stated above, namely, that a public object is an object within the purposes for which governments are established; and with that proposition it is convenient also to consider the fourth proposition, that the state enterprises in question are not objects within the purposes for which governments are established, and also the fifth proposition, that these enterprises are a private business conducted for a private purpose. Reduced to the simplest terms these three propositions amount to this: That in the opinion of the appellants in this cause as citizens and taxpayers of North Dakota, the state ought not to engage in the enterprises which they assail.

TITLE 7. *Subject of Title 6 continued, as to the Purposes of Government.*

"An object within the purposes for which governments are established:"—what indeed are the purposes for which governments are established if not the purposes of the people who establish them? The purpose for which the government of Japan was established is one thing. The purpose for which the government of the France of Napoleon III was established is another thing—of the France of the present republic still another. The purpose for which the government of these States of the Union was established was to give an opportunity for the people of the States to determine their own laws, their own in-

stitutions and their own destiny. We have shown elsewhere in this brief that the people of the several states, at the times when their respective governments were established, had complete, absolute and unlimited power to formulate and effectuate any purpose whatsoever that it pleased them so to do. The phrase "are established," we take it, means in appellants' brief, as it should mean, both the inception of governmental creations and their continued existence. In that continued existence of established governments the purposes of their continued establishment may be as varied as the purposes of their inception. If the governmental form is autocratic, the autocrat may change the governmental purpose by a stroke of his pen. If the governmental form is democratic, the people by their ordered processes of decision may change the governmental purpose to conform with the changing judgment of majorities. Suppose we grant appellants' proposition that "a public object is an object within the purposes for which governments are established." What follows? This: That a public object in a government controlled and operated by its people is an object which the people seek to accomplish through their governmental functions, agencies, instrumentalities and forms. What is public, indeed? It is that which relates to the mass, to the generality, to the commonality of mankind as distinguished from that which is personal, individual and private.

TITLE 8. *Inquiry as to the Enterprises involved; Judicial Notice of Facts.*

With these considerations in mind, what have we to say to the appellants' assertion that the state enterprises here assailed are each a private business and that the purpose of each is a private purpose?

We may as well consider here, what these enterprises are,

shown by the allegations of the bill of complaint, taking to consideration therewith, as it is our duty to do, those facts of history and of present circumstance which are within common knowledge and of which judicial notice is taken. Let us not be misunderstood. We do not mean by suggesting matters other than the mere allegations stated in the complaint, to intimate that we want to go far afield in exploring matters other than those appearing in the printed record. We could confine ourselves to the printed words of the Constitution and laws of the State of North Dakota, and still urge every argument presented in this brief with the full force appropriate to its cogency. But we do not accept appellants' intimation that we should be blind to facts of history and common knowledge. These are before the Court as truly and properly as if pleaded, and are to be considered with the facts pleaded in the complaint. If facts judicially noticed will aid the court in determining its jurisdiction, the Court will not ignore such facts. The United States District Court of North Dakota is presumed to know the Constitution and law of the state, and in order to make up its opinion, it seeks information from any authentic and available source, without waiting for the formal introduction of testimony to prove it, and without confining itself to the process which the parties may offer.

Luther v. Borden, 7 How. 1, 46.

TITLE 9. *The Enterprises Involved: The Mill and Elevator Association.*

First, consider the Mill and Elevator Association Act (Transcript, pages 40-42). "For the purpose of encouraging and promoting agriculture, commerce and industry, the State of North Dakota shall engage in the business of manufactur-

ing and marketing farm products," and for that purpose shall engage in certain subsidiary functions and enterprises. In view of the agricultural character of the state, this act is, in a sense, the keystone of the arch. As to the extent of the state's agricultural interest and of the essential relation of that interest to every other commercial, industrial and social concern of the state, we cannot do better than to refer to the luminous opinions uttered by Judge Amidon of the Federal District Court upon the decision of this case below and of Justices Grace Bronson and Birdzell, who wrote opinions in the recent case of *Green v. Frazier* in the Supreme Court of North Dakota. Doubtless all of those opinions will have, as they merit, the attention of this Court; but particularly in connection with consideration of the Mill and Elevator Act, we cite pages 678 to 680 of *Scott v. Frazier*, 258 Fed. Rep., and pages 17 to 24 of *Green v. Frazier*, 176 N. W. Rep. The enlightening statements of facts contained in these opinions contribute to this discussion circumstances of commanding importance, all of which, as we understand, are matters of which those courts were right in taking judicial notice and which this Court will accept as stated by those local forums. The presentation of the subject considered in each of these opinions is so comprehensive, instructive and persuasive that it would be futile and vain for us to do more than submit this phase of the matter so presented to the consideration of this Court.

TITLE 10. *The Enterprises Involved: The Bank of North Dakota.*

Essentially involved in the successful operation of the enterprises authorized and commanded by the Mill and Elevator Act is that function of state activity set in motion by the provisions of the Bank Act (Transcript, pages 24 to 30). When we

consider how generally the institution of banking has been employed for centuries by various governments in Europe and this country, we may be pardoned for doubting whether the power of the State of North Dakota as employed in the terms of this act would have been brought in question, if the exercise of the state's powers to this end had not been intimately connected with the success of the North Dakota program. However that may be we are frankly at a loss to understand how the powers of the state as exercised under the provisions of the North Dakota Bank Act can seriously be questioned. We invite the closest scrutiny of the terms of that act and submit it without apprehension as to the judgment of the Court thereon.

For convenience of reference we have prepared a brief memorandum as to certain banking institutions well known in history, which illustrate the utility of the institution of banking as an adjunct of government, and as an instrumentality for the successful achievement of governmental purposes. This memorandum we subjoin to our brief as an appendix thereto.

TITLE 11. *The Enterprises Involved: The Home Building Association.*

The third and only remaining separate enterprise instituted by these laws is that found in the Home Building Association Act, (Transcript, pages 48 to 52). This law, as declared in its own terms, is enacted "for the purpose of promoting home building and ownership;" and its terms justify that declaration of purpose. In any community such a purpose is laudable. Again we refer with satisfaction to the admirable statements found in the opinion of Judge Grace of the Supreme Court of North Dakota in *Green v. Frasier*, 176 N. W. Rep. at pages 21 and 22. In that opinion reference is made to the

homestead laws of the United States. The homestead policy of the national government finds a natural and proper sequel in the home building policy of North Dakota. If the state policy is to be brought in question as not pursuing a public purpose, the policy of the United States with respect to homesteads should be brought to bar under the same accusation. The analogy is conclusive. The history of the development of the homestead system is of such interest and importance in this connection that we have prepared a further memorandum presenting the pertinent facts and have included that memorandum as a further appendix subjoined to this brief.

TITLE 12. *Public Purpose: Lack of Definition.*

We recognize the fact that both the decision of the District Court in this cause and the North Dakota Supreme Court in *Green v. Frazier* discuss the issues upon the hypothesis that it is to be decided by the Courts whether the enterprises involved are public or private. This hypothesis, while not conceded, was not disputed at length by these defendants in those courts, for the reason which may also have guided the judges in those forums, that certain expressions in cases decided in this Court seemed to make the issue determinative; and that in view of those expressions it was sufficient to uphold the legislation assailed upon the clear facts of its public character, without proceeding to consider the fundamental nature of constitutional government. Therefore it is found that both the United States District Judge in North Dakota, and the judges of the Supreme Court of that state, dwell at length upon the facts pertinent to that issue. But we find that at the outset of his consideration of the matter Mr. Justice Grace is embarrassed by a lack of definition of the terms involved. In view

of the principles involved that we have expressed elsewhere it is not necessary to enter upon the discussion of what such definitions should be; but if they were required it seems to us that the learned Justice of the North Dakota Court has well supplied the lack (*Green v. Frazier*, 176 N. W. 17).

The research of the distinguished United States District Judge for North Dakota, the results of which illuminate his opinion in this cause below, confirms Justice Grace's discovery of the absence of fixed definition, and shows the steady recession of the Courts from the assumption of power to restrain the advancement of popular control in matters adjudged by the people to concern their common welfare.

TITLE 13. *Public Purpose: Judicial Expressions in regard Thereto.*

In the absence then, of precise definition, we will submit certain propositions pertinent to the inquiry that are gleaned from the decided cases.

To determine whether a use is public or private we have to determine not merely whether interests of individuals will be promoted but whether the interests of the greater part of the community will be.

Olcott v. Fond du Lac, 16 Wal. 678.

"So far as authority to take the property for local public purposes was concerned, the Circuit Court could not enforce any other than the State law. It would respect the sovereign power of the State to define the legitimate public purposes for which private property may be taken, upon compensation to the owner being made or secured."

Traction Co. v. Mining Co., 196 U. S. 252, 253.

"But neither the (14th) Amendment,—broad and comprehensive as it is,—nor any other amendment, was designed "to interfere with the power of the state, sometimes called "its police power, to prescribe regulations to promote the "health, peace, morals, education and good order of the "people, and to legislate so as to increase the industries of the state, develop its resources, and add to its "wealth and prosperity."

Barbier v. Connolly, 113 U. S. 27.

"The court held in these acts of Congress and in the joint "resolution the intended use of this land is plainly set "forth. It is stated in the second Vol. of Judge Dillon's "work on municipal corporations (4th Ed., Sec. 600) that "when the legislature has declared the use or purpose to "be a public one, its judgment will be respected by the "courts, unless the use be palpably without reasonable "foundation. Many of the authorities are cited in the note, "and, indeed, the rule commends itself as a rational and "proper one."

U. S. v. Gettysburg Elec. Ry., 160 U. S. 680.

"The validity of such statutes may sometimes depend "upon many different facts, the existence of which would "make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. "Those facts must be general, notorious and acknowledged "in the State. and the State courts may be assumed to be "exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but "the local courts know and appreciate them. They understand the situation which led to the demand for an enactment of the statutes, and they also appreciate the results upon the growth and prosperity of the State, which

"in all probability would flow from a denial of its validity."

Clark v. Nash, 198. U. S. 367.

"The provision of the 14th Amendment, embodying fundamental conceptions of justice, cannot be deemed to prevent a state from adopting a public policy (for the irrigation of lands.) States may take account of their special exigencies. It has been held that it is not necessary that the state power should rest simply upon the ground that the undertaking is needed for the public health; there are manifestly other considerations of public advantage in providing a general plan of reclamation by which wet lands throughout the state may be opened to profitable use."

O'Neil v. Leamer, 239 U. S. 244, 253.

There is little reason under our system of government for making a close and narrow interpretation on the police power, restricting its scope so as to hamper the legislative power dealing with the various necessities of society and new circumstances as they arise calling for legislative intervention in the public interest.

Budd v. New York, 143 U. S. 517.

"The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote health, morals or public safety."

C. B. & Q. Ry v. Drainage Commrs., 200 U. S. 561, 592.

"But the clause does not limit, nor was it designed to limit the subjects upon which the police power of the State may be exerted. The State can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its

"interests and prosperity."

Minneapolis Ry Co. v. Beckwith, 129 U. S. 26.

"Against that conservation of the mind, which puts to
"question every new act of regulating legislation and re-
"gards the legislation invalid or dangerous until it has be-
"come familiar, government—State and Nation—has press-
"ed on in the general welfare; and our reports are full of
"cases where in instance after instance the exercise of regu-
"lation was resisted and yet sustained against attacks
"asserted to be justified by the Constitution of the United
"States. The dread of the moment having passed, no one
"is now heard to say that rights were restrained or their
"constitutional guarantees impaired."

German Alliance Co. v. Kansas, 233 U. S. 409.

We must assume that if a state of facts could exist that would justify such legislation, it actually did exist when the statutes now under consideration were passed. If no state of circumstances could exist to justify such a statute, than we may declare these void, because in excess of the legislative power of the state. But if it could, we must presume it did.

Munn v. Illinois, 94 U. S. 113.

Amendment of a state constitution to give express authority for legislative enactment must be taken into consideration in determining the validity of laws.

Munn v. Illinois, 94 U. S. 113.

"In the first instance the duty devolves upon the legisla-
"tive branch of the government to determine whether or
"not a proposed tax is for a public purpose; and the courts
"are loath to interpose and declare any tax unlawful, and
"will only do so in case of a palpable disregard of the wise

"limitations, express and implied, restricting the power of
"taxation."

North Dakota v. Nelson Co., 1 N. D. 88.

Necessity alone is not the test by which the limits of state
authority in taxation are to be defined, but wise statemanship
must look beyond expenditures absolutely needful and em-
brace others which may tend to make government subserve the
general well being of society, and to advance the present and
prospective happiness and prosperity of the people.

People v. Salem, 20 Mich. 452, 474.

"The time was when the policy was to confine the func-
"tions of government to limits strictly necessary to secure
"the enjoyment of life, liberty and property. The old Jef-
"fersonian maxim was that the country is governed best
"that is governed the least. At present the tendency is all
"the other way and towards socialism and paternalism in
"government. This tendency is perhaps to some extent
"natural as well as inevitable as the population becomes
"more dense, and society old and more complex in its rela-
"tions. The wisdom of such a policy is not for the courts.
"The people are supreme, and if they wish to adopt such a
"change in the theory of government, it is their right to do
so."

Rippe v. Becker, 56 Minn. 100.

FILE 14. *Public Purpose: The North Dakota Enterprises: Conclusions upon the Facts.*

We submit in conclusion under this head that upon the facts
involved, this Court will not, if it is deemed necessary to reach
conclusion in regard thereto, hold that the purposes intended

by the North Dakota constitution and laws are private purposes, but will recognize the determination and declaration of the people of North Dakota and of their delegated representatives that their state constitution and these laws are the purpose and policy of a state of the Union, public in character and within the powers of statehood.

SECTION 10.

THE NORTH DAKOTA PROGRAM SUSTAINED BY PRECEDENTS IN
THIS COURT.TITLE 1. *The South Carolina Dispensary Case.*

Recalling the language of the North Dakota Constitution here drawn in question, viz., that "the state may engage in any industry, enterprise or business" (Transcript, page 6, folio 8), we find that provision supported by a case decided in this court.

In the case of *South Carolina v. United States*, 199 U. S. 437, the important question was whether persons selling liquor are relieved from liability for internal revenue tax by the fact that they have no interest in the business but are simply agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors. The power of a state to engage in such business was not drawn in question but the reasoning of the Court strongly if not conclusively tends to support the contention of these defendants. We quote from the opinion:

"Each state is subject only to the limitations prescribed by the constitution and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. * * * There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities including not merely therein the supply of gas and water but also the entire railroad system."

"We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. * * * If this change should be made in any state, how much would that state contribute to the revenue of the Nation? * * * Sup-

"pose a state assumes under its police power the control
 "of all those matters subject to the internal revenue tax
 "and also *engages in the business of importing all foreign*
"goods. The same argument which would exempt the sale
 "by a State of liquor, tobacco, etc., from a license tax would
 "exempt the importation of merchandise by a state from
 "import duty." * * *

"The exemption of State agencies and instrumentalities
 "from National taxation is limited to those which are of
 "a strictly governmental character, and does not extend to
 "those which are *used by the State in the carrying on of*
"an ordinary private business. * * * *Whenever a State*
"engages in a business which is of a private nature that pur-
 "pose is not withdrawn from the taxing power of the Na-
 "tion."

South Carolina v. United States, 199 U. S. 437; 454,
 455, 461, 463.

The view taken by this Court as to the power of a state to engage in business is indicated by the course of reasoning in the South Carolina Case. That line of reasoning seems to be as follows:

By the Federal Constitution it was provided that the Federal Government should have the power to raise taxes.

It was not intended, however, that the Federal government should have the power to tax property or instrumentalities of the State regarded as a power supreme in its own sphere.

But if the State enters upon business activities and thereby acquires property and employs instrumentalities in business uses, such property and instrumentalities must not be regarded as belonging to or exercised by the State in its sovereign capacity.

For the State might by acquiring all property and conducting all business, thereby render exempt from taxation all prop-

erty and instrumentalities of business within its borders.

The Federal government cannot be thus deprived of its power of taxation.

Property not essential to the State in its sovereign capacity must remain subject to taxation by the Federal government.

The State might acquire all property and engage in all business.

Therefore, the State might render all property and business exempt, unless property and business not essential to the sovereign power of the State are withheld from exemption.

CITILE 2. *The North Dakota Constitution a Valid Exercise of the State's Power.*

When this Court, in the case just cited, stated a conclusion that necessarily involves the premise that each state might acquire all property and engage in all business, it evidently contemplated a condition of affairs which, however improbable, was constitutionally possible, and so much within possibility of act as to control the issue involved in that case. The provision in the North Dakota Constitution is less broad than the state policy and purpose assumed by this Court to be within the constitutional powers of every state to adopt. Unless the assumption of the state's constitutional powers in the South Carolina case is wrong, the North Dakota constitution is valid.

CITILE 3. *The Portland Case.*

Rules for the ascertainment of a public purpose are stated in *Jones v. Portland*, 245 U. S. 217. The State Supreme Court of Maine had held that the maintenance of a municipal wood-yard was a public purpose. Upon review in this Court the plaintiff in error relied upon the same line of cases that are cited by the appellants in this case. The proceedings here are so recent that we will not consider them in detail but we will content ourselves by referring to certain parts of the opinion.

written by Mr. Justice Day, which seem pertinent to the present controversy. As stated elsewhere in this brief, we do not understand that this Court intended, by quoting certain passages from the opinion in the Maine case, to adopt all the propositions contained therein, but rather to indicate the salient facts relied upon to determine the character of the enterprise as being public. For the sole question argued by counsel upon each side seems to have been whether the woodyard in question was to be regarded as a public or a private enterprise. Upon the issue so presented this Court held among other things that "a judgment of the highest Court of the State upon what should be deemed a public use in a particular state is entitled to the highest respect;" and that a decision of such State Court "declaring a use to be public would be accepted unless clearly not well founded." It naturally follows that when, as in the instant case, the judgment of the State Supreme Court is reinforced by the judgment of the District Court of the United States for the same state, their united conclusions will weigh all the more heavily against adverse claims. It seems to us therefore that the *Portland Case* is decisive of the case at bar in respect to the character of the North Dakota enterprises.

SECTION 11.

OTHER INSTANCES OF STATES ENGAGED IN BUSINESS.

Without going into historical instances, or the multitude of municipal enterprises throughout the country, we cite a few instances of now existing state laws and constitutions whereby one or another state of the Union is engaged or interested in enterprises which are beyond the powers of a state to transact, if the enterprises conducted by the State of North Dakota are beyond such powers.

North Dakota has a state system of bonding officials, and has for years operated a street railway at Bismarck. For years also the State has operated a hail insurance business. (Sections 176-189, Comp. Laws of N. D. 1913).

The State of Montana has entered upon the enterprise of constructing and operating a terminal grain elevator to be aided by the issuance of bonds of the State. See Chapter 204 of the Laws of Montana, 1919.

The State of Ohio has inaugurated the policy and since 1912 has conducted the business of providing for workmen's compensation in case of injury. The course of the State in regard to the project is succinctly expressed in the opinion found in *Munding v. Industrial Commission*, 92 Ohio St. 434-435:

"The original Ohio workmen's compensation act was 'passed May 31, 1911 (102 O.L., 524). Its purpose well 'expressed in its title was, 'to create a state insurance fund 'for the benefit of injured and the dependents of killed 'employees, and to provide for the administration of such 'fund by a State liability board of awards.' This act was 'optional or elective in principle. On February 6, 1912, 'its constitutionality was upheld by this court in the case 'of *State ex rel. v. Creamer*, 85 Ohio St. 349. On Septem-

ber 3, 1912, a constitutional amendment was adopted by the people of Ohio (Sec. 35, Article II), authorizing the passage of laws providing for a state fund to be created by compulsory contribution thereto by employers and administered by the State. Under this Ohio statute, the compensation fund itself is derived from payments made by employers of certain classes; but the administrative expenses incurred in the business of collecting and managing and distributing fund is paid by annual taxation levied upon the whole body of the taxpayers of the State as a part of the annual State tax levy."

The State of Washington in 1917, inaugurated a business system of compensation to injured workmen similar to the Ohio system which is now in force. See Chapter 28, Laws of Washington, 1917.

The State of Georgia has for many years owned and operated the railroad property and business known as the Western & Atlantic Railroad. We quote from Parks Annotated Code of Georgia 1914, Volume 1, this language from Chapter 4:

Section 1287: "Western & Atlantic Railroad Property of the State. The railroad communication from Atlanta, in Fulton County, to Chattanooga on the Tennessee River, is the property of this State exclusively and shall be known as the Western & Atlantic Railroad."

Section 1288: "Relation of the State to the Western & Atlantic Railroad. The State occupies the same relation to said road, as owner, that any company or corporation does to its railroad, and the obligations of the State to the public concerning said road, and of the public to said road are the same as govern the other railroads of this State, so far as is consistent with the sovereign attributes of this State, and the laws of force for its conduct."

In the State of South Dakota, by the present legislature, pro

vision has been made for the state's interesting itself in coal mining and in a state cement plant.

In the State of Arizona there was initiated in 1914, and made effective in the same year by majority vote of the people of the State, an act: "To promote the welfare of the people of the State of Arizona and to provide for the development of the resources of the State and to abolish the contract system of all State construction, and to establish a State Printing Plant and to establish a State Banking System and to make appropriation therefor." See Session Laws of Arizona 1915, p .19, of the last section of the valume. The powers granted by this initiative measure however, have not been put into operation by the State officers.

SECTION 12.

THE REAL ISSUE IS POLITICAL, NOT JUSTICIABLE.

TITLE 1. *Political Events Leading up to the Present North Dakota Program.*

The Third Session of the North Dakota Legislature passed an act appropriating one hundred thousand dollars for building a state elevator or warehouse at Duluth or West Superior (Chapter 61, Session Laws 1893, page 165).

The Eleventh Session passed a concurrent resolution amending the constitution by empowering the legislature to provide for building, leasing, purchasing and operating terminal elevators in the states of Minnesota, and Wisconsin, or either (Session Laws North Dakota, 1909, page 344). The Twelfth Session concurred in that resolution and it was submitted to the people (Chapter 87, page 161, Session Laws 1911). Thereafter it was adopted by an overwhelming majority of the people and became part of the Constitution of the State. It is known as Article 14 of the amendments of the constitution.

The Twelfth Session passed a concurrent resolution amending the Constitution of the State by empowering the legislature to provide for the erection, purchasing and operating of terminal elevators in North Dakota (Chapter 90, page 165 Session Laws 1911). The Thirteenth Session concurred in that resolution, and it was submitted to the people. (Chapter 104, page 132, Session Laws of North Dakota 1913). Thereafter it was adopted by a vote of 51,507 against 18,483, and became what is known as Article 19 of amendments of the constitution (page 403, 404, Session Laws 1913).

The Thirteenth Session also passed an act to provide for funds for the maintenance, purchase, lease or establishment of

a terminal elevator system in Wisconsin or Minnesota, or in both, and to provide a tax on all property within the state for that purpose (See Chapter 279, page 435).

After that came the present amendments of the constitution which were adopted by the people and then the legislative enactment of the State Industrial Program which was again referred to the people by referendum petitions and adopted by large majorities.

TITLE 2. The Interest of the Appellants is Political, not Justiciable.

The true interest of the appellants in this controversy is political, not justiciable. In the complaint they allege that the North Dakota program violates the guaranty of republican government (Transcript, page 13, folio 17). In their brief (page 60), they make the same contention, as one of three claims under the Federal Constitution. As we have remarked before, the real issue amounts to this: the appellants do not approve the constitution and laws of North Dakota, and therefore those enactments should be void. The laws are bad laws, they say, and because the laws are bad, they express a purpose that ought not to be a public purpose, and their operation is not due process of law, and they are unconstitutional. This grievance frequently recurs in the brief: it may be called the dominant note. Instead of according the United States Court in North Dakota and the Supreme Court of that State, the regard due such forums, we are asked to receive their views subject to the intimation that they are "colored by the particular brand of political economy upon which these acts are grounded" (page 94).

That an undesired "brand of political economy" is what troubles appellants, appears again in their view of the Fourteenth

Amendment, as a protection against "enthusiastic legislation" (page 95), a protection also against "the vagaries of sociological dreamers" (page 96). In arguing as to what constitutes a public purpose, it is intimated that the North Dakota program is "an experiment in practical economics" (page 112); and in maintaining that the lack of necessity for the laws is so apparent that "no legitimate argument can be made" to the contrary, the nature of the laws is stated as being "some plan of social economics, or of economics socialized" (page 126).

As a further reason for disregarding the judgment of the people, and of the legislature, and of the Courts of North Dakota, as to the industrial requirements of that state, we are warned that this is "radical legislation," brought about by "emotional action on the part of the people" and by "political disturbances" (page 100).

Finally, in the view of the appellants, this economic experiment, this emotional radicalism, this enthusiastic legislation of a particular brand of socialized economics, becomes an abhorrent effort to "enlarge the power of state" (page 161), and they warn against that peril, "in these days when the power of the state is pressed to such an extent and when the urgency of so-called public purposes rests as a constant menace upon the sacredness of private property" (page 99).

If the statement of judicially-noted facts in Judge Amidon's opinion requires any confirmation in the matter of the steady-moving purpose of the people of North Dakota toward the achievement of the state's industrial program, that confirmation is here, in the vehement language of appellants. They have seen the ebb and flow of political battle, and they have not stood idle while it raged. They have seen the people of the state initiate amendments to their fundamental law, and then adopt them. They have seen the people, by reiterated majorities, send representatives to their capital to enact laws under

an amended constitution. They have seen those laws adopted by two-thirds majorities, *and then upon referendum specifically approved by the people*. This is the common knowledge, not only of the people of North Dakota, but of observant people of the entire land. This is the known political history of North Dakota in recent years. Appellants were dwelling in the making of that history; and of it some might in all modesty say, "*magna pars fui*." Yet now,—although this Court has held, as all courts must hold, that long political discussion and constitutional amendment should be considered in understanding true public purposes,—now appellants reproach the state courts for noting this history, and they ask the Court to ignore it. But their brief itself is witness of those events, and, with its exaggerated denunciation and epithet, appropriate rather to the hustings than to the hall of judgment, confirms the political character of the contested issues. Those issues belong to the people. The minority were justified in opposing every step of the majority; but at length the majority prevailed. The judgment so rendered by the people must be final. Questions of the nature determined by the people of North Dakota are not for the Court. Though it were true that the laws were experimental, economically unsound, the fabric of dreams, even as appellants say, yet as Justice Harlan wrote in *Atkin v. Kansas*, 191 U. S. 223, "no evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter upon the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives,"—in this case, the sanction of the people themselves.

Conclusion

The North Dakota program is not a departure from the form or the spirit of American institutions. It lies within the powers of statehood, and illustrates the fitness of the American system for orderly progress, through the independent activities of the States. It gives new evidence of the capacity of a democratic people for self-government, and lightens a troubled time with a clear ray of hope.

By "the highest and most deliberate act of a free people" the North Dakota constitution has been made to express the people's will that the program should be accomplished. This is indeed a public purpose. There is in the constitution of the United States no prohibition of the State's power thus exercised, and no principle or canon drawn from any other source can defeat its control. The legislature has enacted laws appropriate to the end sought, and the defendants stand upon those laws.

The decree of the District Court should be affirmed.

Respectfully submitted,

WILLIAM LEMKE,

Fargo, North Dakota,

FREDERIC A. PIKE,

St. Paul, Minnesota,

Attorneys for Defendants Frazier, Hagan and

The Industrial Commission of North Dakota.

Appendix

Governmental Banks

The first public bank in Europe, the Banco di Rialto, was established by the Senate of Venice in 1584. The second, established in Venice under the name of Banco del Giro, in 1619, became the only public bank of the city, and was known as the bank of Venice.

The Banco del Giro appears to have been called into existence by national developments of trade. Francis A. Walker refers to it in the statement that "the profits of banking have been realized in a notable degree by several cities that were also States, as Hamburg, Venice and Amsterdam." (Political Economy, p. 430, Sec. 454). The Bank of Amsterdam (1609-1820), and the Bank of Hamburg (1619-1873) were respectively the most important and the longest lived of the old world system of exchange banks. They with others, established by governments, have demonstrated a utility in the development of the countries in which they have existed.

The Bank of Sweden (the Riksbank), was established in 1656. It still exists and has always been the State Bank of Sweden.

The Bank of England was founded in 1694; a small institution at first, with but few more than fifty employes, whose salaries aggregated forty-three hundred and fifty pounds—now a world power in finance, a prop of the British Empire.

The Reichbank, the most useful banking institution in Germany (at least until the recent war), was managed by a bank

directory appointed by the Chancellor of the Empire, up to the time of the empire's fall.

The first Bank of the United States was incorporated in 1791. The government subscribed one-fifth of its capital. Its charter expired in 1811.

The second Bank of the United States was chartered in 1816. Again the government took one-fifth of the capital stock. The President of the United States was authorized to appoint one-fifth of the directors; and public funds were to be deposited in the Bank, unless otherwise ordered by the Secretary of the Treasury.

This brief mention of historic instances serves to recall and illustrate the utility of banking institutions in serving a public purpose under divers circumstances of governmental interest, obligation and responsibility. As instrumentalities of public purpose, defined by law or decree, banks have been promoted, operated and owned, partially or wholly, with more or less investment and hazard of public funds and public credit, by many governments, of widely diverse forms and domain.

The latest instances of the use of banking systems for the accomplishment of public purposes are found in the Federal Reserve Act of 1913, and the Federal Farm Loan Act of 1916. The provisions of these laws are too well known to require statement here. We desire only to point out the feature of the reserve banking system which provides that the United States in certain contingencies shall buy the stock of the reserve banks at par, paying therefor with funds drawn from the national treasury (38 Stat. 251 U. S. Comp. Stat. 1918 Sections 9786-13); and the feature of the Federal Farm Loan Act providing that in certain contingencies it is the duty of the Secretary of the Treasury to subscribe to the stock of each Federal Land Bank and for such stock also to pay with public funds drawn from the national treasury (39 Stat. 364 U. S. Comp.

stat. 1918, Section 9835-c5). In each of these systems public moneys are invested in a banking business. In the case of the federal land banks it is provided that stock owned by the government of the United States shall receive no dividends. The capital of the federal land banks is to be used in making loans secured by first mortgages on farm lands.

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been made and lands have been made productive, *yielding a profit in crops to the farmer and increasing the resources of the nation* (*id.*, p. 215).

"The necessity of * * * giving a preference right to persons desiring to make homes [on the public domain] became more apparent" (*ibid.*). The modification of the system of disposition of public lands which took ultimate form in the homestead laws, beginning with the act of May 20, 1862, first came under discussion as a national question in 1852, when a national political convention adopted, as a plank of its platform, a declaration that the public lands of the United States should not be sold but should be granted *free of cost* to landless settlers. Thereafter the question was mooted in the national forum and was the subject of platforms of political parties until 1862 (*id.* p. 332).

"The rich and fertile lands of the Mississippi Valley were fast filling up with settlers. Agricultural lands in the Middle States, which, after the year 1824, were bought for \$1.25 per acre, now sold at from \$50 to \$80 per acre. Former purchasers of these Government lands in the Middle, Western and Southern States, were selling their early purchases for this great advance, and moving west, to Iowa, Wisconsin, Minnesota, and Missouri, and there again taking cheap Government lands under the pre-emption laws.

"The western emigration caused a rush—a migration of neighborhoods in many localities of the older Western states. Following the sun, their pillar of fire, these State founders moved westward, a resistless army of agents of American civilization, and there was a demand for homes on the public lands, and a strong pressure for the enactment of a law which should confine locators to small

The National Homestead Policy, and its Relation to the Home Building Program of North Dakota.

The homestead laws of the United States, as a policy of disposition of the public lands of the nation, followed the system provided in the pre-emption acts. In 1790 Alexander Hamilton, Secretary of the Treasury, presented to the Congress a plan for the disposition of public lands, in which he said that "in the formation of a plan for the disposition of the vacant lands of the United States there appear to be two leading objects of consideration: one, the facility of advantageous sales, according to the probable course of purchases; the other the accommodation of individuals now inhabiting the western country or who may hereafter emigrate thither. The former, as an operation of finance, claims primary attention; the latter is important as it relates to the satisfaction of the inhabitants of the western country." Hamilton presented also details of administration; and his report formed the basis of the disposition of the public domain from that time forward. Thus early "the accommodation of individuals" and "the satisfaction of the inhabitants" especially concerned, as personal beneficiaries of the grant of public lands, became the national policy as a means of promoting the general welfare. The pre-emption acts, beginning in 1801, enacted that policy into law, offering "a *premium* in favor of and condition for making permanent settlement and a home, a *preference* for actual tilling and residing upon a piece of land" ("The Public Domain," Ex. Doc. 47, Part 4, 46th Congress, 3rd Session, H. of R., p. 214).

The pre-emption system grew out of consideration for the needs of settlers. The early idea of sales for revenue was abandoned; and a plan of disposition for homes was substituted. It has been many-phased, but it has always contained the germ of settlement, under which thousands of homes have

"tracts, and require actual occupation, improvement and "cultivation" (*id.*, pp. 332, 333).

The first homestead bill offered in Congress was defeated in 1859. But in the following Congress "a bill to secure homesteads to actual settlers on the public domain" was passed. It was vetoed by President Buchanan, June, 1860, who objected that Congress had no power to give away the public lands (*id.*, p. 342; 5 Messages 609). But in 1862, a similar bill was enacted and was signed by President Lincoln. In his first annual message President Johnson said of this law, "the homestead policy was established only after long and earnest resistance. Experience proves its wisdom. The lands in the hands of industrious settlers, whose labor creates wealth and contributes to the public resources, are worth more to the United States than if they had been reserved as a solitude for future purchasers." (6 Messages 362).

The essence of the homestead law and the amendments is embodied in the conditions of actual settlement. *It gives for a nominal fee 160 acres of land to the settler who complies with its terms, "in good faith to obtain a home for himself"* ("The Public Domain," *ut. sup.*, p. 350; Sec. 4531 U. S. Comp. Stat. 1918, "Compact Edition;" R. S. Sec. 2290, amended March 3, 1891, C. 561, 26 Stat. 1097).

"The homestead act stands as the concentrated wisdom "of legislation for settlement of the public lands. *It protects the government, it fills the states with homes, it builds up communities, and lessens the chances of social and civil disorder by giving ownership of the soil, in "small tracts, to the occupants thereof. It was copied "from no other nation's system. It was originally and "distinctively American, and remains a monument to its "originators"* ("The Public Domain," p. 350).

This is the measure to which Emerson referred, when, grouping it among the "moments of expansion in modern history," with the English Commonwealth of 1648, the Declaration of Independence, the repeal of the Corn-Laws and the Emancipation Proclamation, he characterized them all as "acts of great scope, working on a long future, and on permanent interests, and honoring alike those who initiate and those who receive them. These measures provoke no noisy joy, but are received with a sympathy so deep as to apprise us that mankind are greater and better than we know." While each of these events was a "sally of the human mind into the untried future," yet it was "a step forward into the direction of catholic and universal interests" ("The President's Proclamation," in *The Atlantic Monthly*, Vol. 10, p. 638, November, 1862).

The homestead law owes its "origin to the demand for a population of the right sort in a new country, to the conviction that the freeholder rather than the tenant is the *natural supporter of popular government*, * * * and to belief that such laws encourage the stability of the family" (Article by Newton Mereness, Enc. Brit. 11th Ed. XIII, 639).

We are not aware that President Buchanan's contention that the homestead law was invalid, as an attempted disposition of public property for a private purpose, was ever brought to court. It is safe to assert, however, that the law is indisputably supported upon the grounds stated above.

The enactment of the Home Building Association Act by the Legislature of North Dakota was another "step forward" in the direction pointed by the National homestead act. Almost without variation the historic, economic and sociologic reasons for the enactment of the homestead act and for its successful operation, that we have recited in the foregoing paragraphs, may be truly and aptly repeated in support of the poli-

cy of North Dakota in furtherance of home building under its jurisdiction. That that policy is the formulation of a public purpose, in view of the unanimous judgment of American statesmen of this day as to the homestead laws, it would be idle to dispute. The general welfare of the state is intimately and essentially involved in any policy that will introduce "a population of the right sort," "encourage the stability of the family," and produce citizens who become "natural supporters of popular government." These results the Home Building Law will help to accomplish, just as truly as the Homestead Law will continue so to do. It is indeed "a sally into the untried future," but it holds out large promise of being "a step forward in the direction of catholic and universal interests."

SCOTT ET AL. v. FRAZIER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NORTH DAKOTA.

No. 508. Argued April 19, 20, 1920.—Decided June 1, 1920.

A suit by taxpayers to enjoin payment of public moneys and issuance of bonds by a State, in which jurisdiction is invoked solely because of alleged violation of their constitutional rights, cannot be entertained by the District Court if it is not alleged that the loss or injury to any complainant amounts to \$3,000. P. 244.

258 Fed. Rep. 669, reversed.

THE case is stated in the opinion.

Mr. N. C. Young, Mr. Tracy R. Bangs and Mr. C. J. Murphy for appellants.

Mr. S. L. Nuchols and Mr. W. S. Lauder, with whom *Mr. William Langer*, Attorney General of the State of North Dakota, was on the brief, for appellees.

Mr. Frederic A. Pike, with whom *Mr. William Lemke* was on the brief, for Frazier, Governor, Hagan, Commissioner of Agriculture and Labor, and the Industrial Commission of North Dakota, appellees.

Memorandum opinion by direction of the court, by
MR. JUSTICE DAY.

This suit so far as the merits are concerned is like No. 811, just decided, *ante*, 233. It was brought in the District Court of the United States for the district of North Dakota to enjoin the payment of public funds in the State Treasury and the issuing of state bonds under the constitution and laws of North Dakota. We have sufficiently stated the nature of this constitution and the laws involved in the opinion in No. 811.

The jurisdiction was invoked because of alleged violation of rights under the Fourteenth Amendment. The complainants were taxpayers of North Dakota who alleged that suit was brought on behalf of themselves and all other taxpayers of the State. There was no diversity of citizenship and jurisdiction was rested solely upon the alleged violation of constitutional rights. The District Court rendered a decree dismissing the bill on the merits, the judge stating that he was of opinion that there was no jurisdiction and directing the dismissal on the merits to prevent delay and to permit the suit being brought here by a single appeal.

There is no allegation that the loss or injury to any complainant amounts to the sum of \$3,000. It is well settled that in such cases as this the amount in controversy must equal the jurisdictional sum as to each complainant. *Wheless v. St. Louis*, 180 U. S. 379; *Rogers v. Hennepin County*, 239 U. S. 621.

The District Court was right in its conclusion that there was no jurisdiction. The decree is reversed and the cause remanded to the District Court with directions to dismiss the bill for want of jurisdiction.

So ordered.